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Supreme Court, U.S.
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In The

Supreme Court of the United States

LAFFIT PINCAY, JR. and
CHRISTOPHER J. McCARRON,

Petitioners,

v.

VINCENT S. ANDREWS, ROBERT ANDREWS, and
VINCENT ANDREWS MANAGEMENT CORP.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *Pioneer Investment v. Brunswick*, 507 U.S. 380 (1993) (*"Pioneer"*) that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Id.* at 392. Here, a three-judge panel of the Ninth Circuit held that the district court abused its discretion by granting an extension of time to respondents to file a notice of appeal after their very experienced federal practitioner claimed that he delegated his responsibility to know the time for filing an appeal to his calendaring clerk who allegedly made a mistake in construing Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

In a divided opinion of an en banc panel, the Ninth Circuit reversed its own three-judge panel, but conceded that the Ninth Circuit conflicts with the Second, Seventh, and Eleventh Circuits, which hold a district court abuses its discretion under Rule 4(a)(5)(A) of the Federal Rules of Appellate Procedure in similar cases. The dissent noted that the Ninth Circuit also conflicts with the Fifth, Eighth, and Tenth Circuits. Thus, the question presented is as follows.

Should this Court resolve the conflict between the Ninth Circuit and six other Circuits on the question of whether, in similar situations, a district court abuses its discretion under Rule 4(a)(5)(A) of the Federal Rules of Appellate Procedure when it grants an extension to an experienced federal practitioner who negligently misunderstands a clear procedural rule?

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CITATIONS OF DECISIONS BELOW

The official report of the Ninth Circuit's order to take this case en banc (Appendix ("App."), 47) is at 367 F.3d 1087 (9th Cir. 2004). The official report of the Ninth Circuit's en banc opinion (App. 1-22) is at 389 F.3d 853 (9th Cir. 2004). The official report of the opinion of the Ninth Circuit's three-judge panel (App. 29-46) is at 351 F.3d 947 (9th Cir. 2003). An official report of the district court's decision (App. 23-28) does not exist.

JURISDICTION

The Ninth Circuit, siting en banc, entered judgment on November 15, 2004. (App. 1.) Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure ("the 30-day rule") provides, in relevant part, as follows:

> (a) **Appeal in a Civil Case.** (1) *Time for Filing a Notice of Appeal.*
>
> (A) In a civil case, except as provided in rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

Rule 4(a)(5)(A) of the Federal Rules of Appellate Procedure ("Rule 4(a)(5)(A)") provides, in relevant part, as follows:

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

STATEMENT

A. District Court's Jurisdiction

The district court has jurisdiction under 28 U.S.C. §§ 1331 and 1332 because (a) petitioners sued the respondents under federal law, for example, the civil Racketeer Influenced and Corrupt Organizations Act ("RICO"), and (b) petitioners are citizens of California, and the respondents are not. Petitioners also alleged claims under California law.

B. Previous Decisions

In 1992, a jury returned verdicts in petitioners' favor on the RICO and California law claims. The district court ordered petitioners to elect a remedy, and they chose RICO. The district court entered judgments on the RICO verdicts. The Ninth Circuit reversed and remanded, holding that the federal statute of limitations barred the RICO claims. *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th

Cir. 2001). This Court denied certiorari. *Pincay v. Andrews*, 534 U.S. 885 (2001).

C. Subsequent Decisions

1. District Court

After remand, petitioners elected to pursue their California law remedies. On July 3, 2002, the district court entered judgments for petitioners. The 30-day rule required the respondents to file a notice of appeal by August 2, 2002. Respondents failed to do so.

On August 27, 2002, respondents' counsel, the law firm of Boies, Schiller & Flexner LLP, filed a notice of appeal and a motion asking the district court for an extension pursuant to Rule 4(a)(5)(A). (Plaintiffs-Appellants' Excerpts of Record ("ER") 045, 189.) The motion argued, in essence, that "excusable neglect" caused the untimely filing (ER 051), and attached the declarations of a very experienced federal practitioner and his calendaring clerk, or as the federal practitioner prefers "case manager." (ER 070-074); Defendants-Appellees' Supplemental Excerpts of Record ("SER") at 1-10.)

In essence, the federal practitioner blamed his calendaring clerk for the neglect. (ER 071-073.) More specifically, the federal practitioner did not bother reading the 30-day rule before relying solely on his calendaring clerk's erroneous advice that stated as follows: "According to FRAP Rule 4, we get 60 days from date of entry of judgment, which was 7/3/02. 60 days would run us to 9/1, which is a Sunday. So 9/2 would be the last day to file a Notice of Appeal." (SER 7.)

The federal practitioner's declaration, in part, claimed that he "had been . . . out of the office, working at a client's offices or elsewhere, since June [2002]" (ER 072, lines 22-23), and that his calendaring clerk "had never [before] failed to properly calendar a deadline." (ER 072, line 12.)

Petitioners' opposition argued, in essence, that under *Kyle v. Campbell Soup Company*, 28 F.3d 928, 930-32 (9th Cir. 1994), *cert. denied*, 513 U.S. 867 (1994), the federal practitioner failed to present a persuasive justification for his misunderstanding a clear and unambiguous rule and, therefore, the motion failed to establish "excusable neglect." (ER 150-52.)

The district court, citing *Marx v. Loral Corp.*, 87 F.3d 1049 (9th Cir. 1996), concluded that under *Pioneer* "the prevailing view – especially regarding Rule 4 – is that attorney mistakes made in good faith with no prejudice to the other party are excusable neglect . . . . Thus, mistake or miscalculation are legitimate reasons to extend time to file an appeal under Rule 4(a)(5)(A)." (ER 158.) Accordingly, the district court granted the motion to extend the time to file a notice of appeal. (ER 159.) Petitioners appealed the district court's decision. (ER 160.)

2. Three-Judge Panel

A divided opinion of a three-judge panel of the Ninth Circuit reversed the district court's extension of time. *Pincay v. Andrews*, 351 F.3d 947, 948 (9th Cir. 2003). The majority (Judges Noonan and Wardlaw) followed *Kyle*, 29 F.3d 928, found *Marx*, 87 F.3d 1049, inapplicable, and held that the district court made a mistake of law. *Pincay*, 351 F.3d at 949-50. The majority citing *Pioneer*, stated, in essence, that the federal practitioner was ignorant of the

rules and compounded that ignorance by delegating knowledge of the rules to a nonlawyer and then blaming the nonlawyer for the error. *Id.* at 947.

The dissent (Judge Kleinfeld) did not "quarrel with the majority's exasperation at an experienced lawyer from a large and well-staffed firm carelessly delegating the reading of appellate rules to a nonlawyer and failing adequately to supervise." *Id.* at 951. The dissent contended, however, that the district court did not abuse its discretion under Rule 4(a)(5)(A). *Id.* at 953-54.

3. En Banc Panel

A divided opinion of an eleven-judge en banc panel reversed the three-judge panel and affirmed the district court's extension of time. *Pincay v. Andrews,* 389 F.3d 853, 860 (9th Cir. 2004) (App. 13-14). The Ninth Circuit acknowledged that "several of our sister circuits have tried to fashion a rule making a mistake of law per se inexcusable under Rule 4." *Id.* at 859-60 (App. 13). Yet the Ninth Circuit concluded "there should . . . be no rigid legal rule against late filings attributable to any particular type of negligence. Instead, we leave the weighing of *Pioneer*'s equitable factors to the discretion of the district court in every case. We hold that the district court did not abuse its discretion in this case. . . ." *Id.* at 860 (App. 13-14).

The concurring opinion stated, in part, that " . . . *Pioneer* . . . indicates that a district court may find neglect 'excusable' if it is caught quickly, hurts no one, and is a real mistake, rather than one feigned for some tactical reason – *even if* no decent lawyer would have made that

error. . . ." (Emphasis in original.) *Id.* at 860 (Berzon, J., concurring) (App. 14).

The dissent (Judges Kozinski, Rymer, and McKeown) concluded, in essence, that "[n]o circuit has taken a position as charitable to lawyer errors as we do today; the decision is at odds with decisions in at least six other circuits." *Id.* at 863 (citations omitted) (App. 21).

REASONS FOR GRANTING THE PETITION

Pioneer established a guideline that "ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect." *Pioneer*, 507 U.S. at 392. As this Court observed a few years ago, " . . . [t]he unanimous view of . . . six Court of Appeals . . . have held that the *Pioneer* standard applies in Rule 4 cases." *Stutson v. United States*, 516 U.S. 193, 195 (1996) (citations omitted). Yet *Pioneer* involved a bankruptcy court's notice that (a) "was outside the ordinary course in bankruptcy cases" and (b) had a "'dramatic ambiguity.'" *Pioneer*, 807 U.S. at 398.

In sharp contrast, the conflict created by the Ninth Circuit concerns the scope of a district court's discretion under Rule 4(a)(5)(A) in cases involving a federal practitioner's ignorance or mistake regarding clear procedural rules, such as the 30-day rule. *Compare Pincay*, 389 F.3d at 858-60 (App. 10-13), *with, e.g., Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355 (2d Cir. 2003), *cert. denied, sub nom. Essef v. Silivanch*, 124 S.Ct. 1047 (2004); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457 (8th Cir. 2000), *cert. denied*, 531 U.S. 929 (2000). Indeed, the 30-day rule is "so well known among federal practitioners that,

had the [federal practitioner in this case] but *thought* about the rule, rather than relying entirely on the calendaring clerk's representation, he would have surely realized that the 60-day period is wrong." *Pincay*, 389 F.3d at 863 (Kozinski, J., dissenting) (App. 20); " . . . [A]ny [federal practitioner] . . . should have been able to read the rule correctly." *Id.* at 855 (App. 3). Moreover, the rule is mandatory and jurisdictional. *Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 264 (1978).

A. Six Circuits Hold District Courts Abuse Discretion Under Rule 4(a)(5)(A) When Granting Extensions To Experienced Federal Practitioners Who Negligently Misunderstand Clear Procedural Rules.

In *Silivanch*, 333 F.3d 355, the unanimous opinion of a three-judge panel reversed a district court's decision under Rule 4(a)(5)A), and informed the Second Circuit's district courts that a federal practitioner's failure to calculate the 30-day rule filing deadline himself before relying on the opposing federal practitioner's wrong advice about the filing deadline is not excusable neglect under Rule 4(a)(5)(A). *Id.* at 365-70. The Second Circuit found no justification for treating the case differently from *United States v. Hooper*, 43 F.3d 26, 28-29 (2d Cir. 1993), where a legal assistant mistakenly thought that the rule called for a thirty instead of a ten-day limitation. *Silivanch*, 333 F.3d at 367-70.

Judge Posner's majority opinion for a divided three-judge panel in *Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132 (7th Cir. 1996), instructed the Seventh Circuit's district courts that, in essence, when a rule is "crystal clear," "the error egregious," the federal

practitioner is "highly experienced," and "the excuses so thin as to leave the lapse not unexcused but inexplicable," a district court abuses its discretion by granting an extension under Rule 4(a)(5)(A). *Id.* at 134.

A unanimous three-judge panel in *Advanced Estimating System Inc. v. Riney*, 130 F.3d 996 (11th Cir. 1997), reversed a district court's grant of an extension to a federal practitioner who mistakenly believed that he had ten days from his receiving notice of entry of a judgment to file his post trial motions and by that toll the running of the 30-day rule. *Id.* at 997. The Eleventh Circuit instructed its district courts that, in essence, a federal practitioner's misunderstanding of clear law cannot constitute excusable neglect. *Id.* at 998. "If it could, almost every appellant's lawyer would plead his own inability to understand the law when he fails to comply with a deadline." *Id.*

The divided opinion of a three-judge panel in *Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877 (5th Cir. 1998) reversed a magistrate judge's grant of an extension under Rule 4(a)(5)(A). The majority (*id.* at 879) followed the Fifth Circuit's unanimous decision in *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465 (5th Cir. 1998), which affirmed a district court's decision to deny an extension to file a notice of appeal, holding that a federal practitioner's misreading Rule 6(e) of the Federal Rules of Civil Procedure to apply to judgments served by mail did not constitute excusable neglect under Rule 4(a)(5)(A). *Id.* at 467-70. The dissent in *Midwest Employers*, 161 F.3d at 885, cited *United States v. Brown*, 133 F.3d 993 (7th Cir. 1998), but that case involved an inexperienced attorney

who confused state rules with federal rules. *Id.* at 997 ("The court considered the attorney's inexperience."). In sharp contrast, the Seventh Circuit's decision in *Prizevoits* involved "a highly experienced federal litigator." *Prizevoits,* 76 F.3d at 133. The same is true here. (ER 070.)

In a case involving a federal practitioner's miscalculation of the thirty days to file a notice of appeal, a unanimous three-judge panel in *Lowry*, 211 F.3d 457, informed the Eighth Circuit's district courts that a federal practitioner's garden-variety inattention in misapplying clear procedural rules cannot excuse the federal practitioner's failure to file a timely notice of appeal. *Id.* at 463-64.

Judge Ebel's opinion for a unanimous three-judge panel in *United States v. Torres*, 372 F.3d 1159 (10th Cir. 2004), advised the Tenth Circuit's district courts that when the reason for delay is simply that a federal practitioner confused the filing deadlines for civil and criminal appeals, the federal practitioner's misinterpretation of a readily accessible, unambiguous rule cannot be grounds for relief under Rule 4(a)(5)(A). *Id.* at 1163-64.

Respondents will argue that the cases are distinguishable. Yet the difference between the cases is minimal at best. Indeed, the decisions in the Second, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits concern, as does this case, a district court's grant of an extension under Rule 4(a)(5)(A) in cases involving a federal practitioner's mistake regarding a clear procedural rule, such as the 30-day rule. *E.g., Silivanch*, 333 F.3d at 367-70; *Lowry,* 211 F.3d at 463-64. If a district court in these six Circuits, was as lenient as the district court was in this case, each of the six Circuits would have the same definite

and firm conviction as Judges Kozinski, Noonan, Rymer, McKeown, and Wardlaw have here, namely that the district court abused its discretion under Rule 4(a)(5)(A).

B. Ninth Circuit's Affirmance Of District Court's Decision Conflicts With *Pioneer's* Guideline.

Under Rule 4(a)(5)(A), the petitioners each have a substantial right not to be subjected to the respondents' federal practitioner's inexcusable neglect. *See generally* Stern, *Changes in the Federal Appellate Rules*, 41 F.R.D. 297, 298-99 (1967); *see also In re O.P.M. Leasing Services, Inc.*, 769 F.2d 911, 916 (2d Cir. 1985). The Ninth Circuit's affirmance of the District Court's abuse of discretion has adversely affected this right.

The district court's decision to grant an extension in this case makes neither good sense nor good policy for the federal court system. Federal courts expect experienced federal practitioners, wherever they are situated, to possess knowledge of the plain and elementary rules of federal procedure that are commonly or readily found by standard research techniques, such as reading a clear procedural rule. *E.g., Silivanch*, 333 F.3d at 367-70; *Lowry*, 211 F.3d at 463-64; *Prizevoits*, 76 F.3d at 133 ("Prizevoits' principal lawyer is a highly experienced federal litigator. He must know about Rule 6(b) [of the Federal Rules of Civil Procedure].").

Obviously, in this case the federal practitioner and his law firm are very experienced. Thus, even if the calendaring clerk "had never [before] failed to properly calendar a deadline" (ER 72, line 12), that provides no

excuse under Rule 4(a)(5)(A) for a very experienced federal practitioner's negligence of "abdicating his basic duty – to determine the applicable appeal deadline based on a clear-as-day rule." *Pincay,* 389 F.3d at 859 (Kozinski, J., dissenting) (App. 19); *cf. Silivanch,* 333 F.3d at 366-67; *FHC Equities, L.L.C. v. MBL Life Assurance Corp.,* 188 F.3d 678, 686 (6th Cir. 1999) (citing with approval *Peake v. First Nat'l Bank & Trust*, 101 F.R.D. 544, 545-46 (W.D. Mich. 1984), holding that reliance on an associate's wrong research is not "excusable neglect.").

Experienced federal practitioners cannot be permitted to blame or hide behind their "secretaries" (or in large law firms, the "calendaring system") as an excuse under Rule 4(a)(5)(A) for the federal practitioner's ignorance of or mistakes regarding clear procedural rules, such as the 30-day rule. *See Silivanch,* 333 F.3d at 366-67; *FHC Equities,* 188 F.3d at 672. And "[i]dentifying classes of cases where *Pioneer* balancing cannot excuse neglect is not, as the [en banc] majority suggests [see *Pincay*, 389 F.3d at 860 (App. 13)], adopting a per se rule" against all mistakes of law. *Id.* at 863-64 (Kozinski, J., dissenting) (App. 21). "It is merely providing the sort of guidance that [Circuits] are entitled and required to give district courts. This is, in fact, what [the] Court did in *Pioneer*: [The Court] re-weighed the factors assessed in the bankruptcy court and found abuse of discretion." *Id.*

"[*Pioneer*'s balancing] [f]actors one, two, and four . . . almost always cut one way: Delays are seldom long . . . prejudice is typically minimal. Bad-faith delay is rare, given that we're [not] dealing with . . . deliberate flouting of the rules [citations omitted]. Most of the work . . . is done by factor three [the reason for the delay], the most important one [citing *Lowry,* 211 F.3d at 463]. . . . " *Pincay*, 389 F.3d at 861 (Kozinski, J., dissenting) (App. 16-17).

> . . . In this case, the district court found there was no prejudice to [petitioners], the delay was short and there was no bad faith. Thus, [respondents] need not have offered a terribly good countervailing reason to make their neglect excusable. But they needed to show *something*. Was this a class action that bristled with client "consultation difficulties"? *See Marx v. Loral Corp.*, 87 F.3d 1049, 1053-54 (9th Cir. 1996). Was the client distracted by a divorce and job change, and had lost his lawyer to boot? [Citation omitted.] Was the rule confusing or notice of the deadline unusual? *See Pioneer*, 507 U.S. at 398. No, no and no. The action was not complicated; the [federal practitioner] worked at a large, sophisticated law firm; and the rule is as clear as legal rules get. . . . *Pincay*, 389 F.3d at 861-62 (Kozinski, J., dissenting) (App. 17) (emphasis in the original).

"Rather than present a reason for the neglect, [respondents] call the error 'inexplicable,' [citation omitted], and 'aberrational.' . . . But 'inexplicable' and 'aberrational' are not synonyms for excusable. In such circumstances, . . . the [*Pioneer*] balance [cannot] tilt in favor of excusability." *Id.* at 862 (Kozinski, J., dissenting) (App. 18).

Summarizing the respondents' federal practitioner's neglect is inexcusable under Rule 4(a)(5)(A). *Id.* at 864 (Kozinski, J., dissenting); *cf., e.g., United States v. Torres*, 372 F.3d at 1163-64; *Silivanch*, 333 F.3d at 367-70; *Lowry*, 211 F.3d at 463-64; *Advanced Estimating System*, 130 F.3d at 997-98; *Prizevoits*, 76 F.3d at 133-34.

Respondents may argue that granting the extension makes good sense and good policy because the extension avoids penalizing the respondents for their federal

practitioner's omissions. This Court has made clear, however, that federal courts must hold clients accountable for the omissions of their federal practitioners. *Link v. Wabash,* 370 U.S. 626, 633 (1962); *accord Pioneer*, 507 U.S. at 396-97.

Respondents may rework their argument to say that the extension allows the Ninth Circuit to consider the issues of the underlying appeal. Still, as the Second Circuit noted in *Silivanch*, "the legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced – where every missed deadline was the occasion for the embarkation on extensive trial and appellate litigation to determine the equities enforcing the bar." *Silivanch,* 333 F.3d at 370.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAFFIT PINCAY, JR.; CHRISTOPHER J. MCCARRON, *Plaintiffs-Appellants*, v. VINCENT S. ANDREWS; ROBERT ANDREWS; VINCENT ANDREW MANAGEMENT CORP., *Defendants-Appellees*.	No. 02-56577 D.C. Nos. CV-89-01445-WMB CV-89-04965-WMB OPINION

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Senior Judge, Presiding

Argued and Submitted En Banc
June 24, 2004 – San Francisco, California

Filed November 15, 2004

Before: Mary M. Schroeder, Chief Judge, Alex Kozinski, Pamela Ann Rymer, Andrew J. Kleinfeld, Sidney R. Thomas, Barry G. Silverman, M. Margaret McKeown, Ronald M. Gould, Marsha S. Berzon, Johnnie B. Rawlinson, and Consuelo M. Callahan, Circuit Judges.

Opinion by Chief Judge Schroeder;
Concurrence by Judge Berzon;
Dissent by Judge Kozinski

COUNSEL

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David Boies and Robert Silver, Boies, Schiller & Flexner, LLP, Armonk, NY, for defendants-appellees.

OPINION

SCHROEDER, Chief Judge.

This appeal represents a lawyer's nightmare. A sophisticated law firm, with what it thought was a sophisticated system to determine and calendar filing deadlines, missed a critical one: the 30-day time period in which to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A). The rule, however, provides for a grace period of 30 days within which a lawyer in such a fix may ask the district court for an extension of time, and the court, in the exercise of its discretion, may grant the extension if it determines that the neglect of the attorney was "excusable."[1] Here an experienced trial judge found excusable neglect, and the appellee asks us to overturn that ruling.

[1] The rule provides in relevant part: "The district court may extend the time to file a notice of appeal if: (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) . . . that party shows excusable neglect or good cause." Fed. R. App. P. 4(a)(5)(A).

The underlying dispute began in 1989 when Laffit Pincay, Jr. and Christopher McCarron (Pincay) sued Vincent S. Andrews, Robert L. Andrews, and Vincent Andrews Management Corp. (Andrews) for financial injuries stemming from alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and California law. In 1992, a jury returned verdicts in Pincay's favor on both the RICO and the California counts. Pincay was ordered to elect a remedy, and he chose to pursue the RICO judgment. This judgment was reversed on appeal on the ground that the RICO claim was barred by the federal statute of limitations. *Pincay v. Andrews,* 238 F.3d 1106, 1110 (9th Cir. 2001). On remand, Pincay elected to pursue the remedy on his California law claim. Judgment was entered in his favor on July 3, 2002.

Andrews's notice of appeal was due 30 days later, but a paralegal charged with calendaring filing deadlines misread the rule and advised Andrews's attorney that the notice was not due for 60 days, the time allowed when the government is a party to the case. *See* Fed. R. App. P. 4(a)(1)(B). Andrews's counsel learned about the error when Pincay relied upon the judgment as being final in related bankruptcy proceedings, and Andrews promptly tendered a notice of appeal together with a request for an extension within the 30-day grace period. By that time the matter had been in litigation for more than 15 years. Everyone involved should have been well aware that the government was not a party to the case, and any lawyer or paralegal should have been able to read the rule correctly. The misreading of the rule was a critical error that, had the district court viewed the situation differently, would have ended the litigation then and there with an irreparably adverse result for Andrews. The district court, however,

found the neglect excusable and granted the motion for an extension of time to file the notice of appeal.

Pincay appealed to this court, and a majority of the three-judge panel concluded that Andrews's attorney had improperly delegated the function of calendaring to a paralegal, and held that the attorney's reliance on a paralegal was inexcusable as a matter of law. *Pincay v. Andrews,* 351 F.3d 947, 951-52 (9th Cir. 2003). It ordered the appeal dismissed. The dissent would have applied a more flexible and deferential standard and affirmed the district court. *Id.* at 952-56 (Kleinfeld, J., dissenting).

A majority of the active non-recused judges of the court voted to rehear the case en banc to consider whether the creation of a per se rule against delegation to paralegals, or indeed any per se rule involving missed filing deadlines, is consistent with the United States Supreme Court's leading authority on the modern concept of excusable neglect, *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380 (1993). We now hold that per se rules are not consistent with *Pioneer,* and we uphold the exercise of the district court's discretion to permit the filing of the notice of appeal in this case.

The *Pioneer* decision arose in the bankruptcy context and involved the "bar date" for the filing of claims. The Court in *Pioneer* established a four-part balancing test for determining whether there had been "excusable neglect" within the meaning of Federal Rule of Bankruptcy Procedure 9006(b)(1). The Court also reviewed various contexts in which the phrase appeared in the federal rules of procedure and made it clear the same test applies in all those contexts. The *Pioneer* factors include: (1) the danger of prejudice to the non-moving party, (2) the length of

delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the moving party's conduct was in good faith. 507 U.S. at 395.

In this case, the district court analyzed each of the *Pioneer* factors and correctly found: (1) there was no prejudice, (2) the length of delay was small, (3) the reason for the delay was carelessness, and (4) there was no evidence of bad faith. It then concluded that even though the reason for the delay was the carelessness of Andrews's counsel, that fact did not render the neglect inexcusable. The district court relied on this court's decision in *Marx v. Loral Corp.*, 87 F.3d 1049 (9th Cir. 1996), in which we affirmed an order granting an extension of time in a case that involved an attorney's calendaring error.

Because the panel majority decided the case in part on the issue of delegation of calendaring to a paralegal, we consider that issue first. This issue was not presented to the district court, and it was raised sua sponte by the three-judge panel.

In the modern world of legal practice, the delegation of repetitive legal tasks to paralegals has become a necessary fixture. Such delegation has become an integral part of the struggle to keep down the costs of legal representation. Moreover, the delegation of such tasks to specialized, well-educated non-lawyers may well ensure greater accuracy in meeting deadlines than a practice of having each lawyer in a large firm calculate each filing deadline anew. The task of keeping track of necessary deadlines will involve some delegation. The responsibility for the error falls on the attorney regardless of whether the error was made by an attorney or a paralegal. *See* Model Rules

of Prof'l Conduct R. 5.5 cmt. 2 (2002) ("This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work."). We hold that delegation of the task of ascertaining the deadline was not per se inexcusable neglect.

The larger question in this case is whether the misreading of the clear rule could appropriately have been considered excusable. Resolution of that question requires some effort to try to distill any principles that have evolved in the 10 years since *Pioneer.* In *Pioneer* itself, the Court adopted a broader and more flexible test for excusable neglect. A narrower test existed in many circuits before *Pioneer* that limited excusable neglect to situations that were beyond the control of the movant for an extension as, for example, the messenger being hit by a truck on the way to the court clerk's filing desk. *See Pioneer,* 507 U.S. at 387-88 & n.3.

The district court followed our decision in *Marx,* where we acknowledged that *Pioneer* had worked a change in our circuit's law as to what constitutes excusable neglect. 87 F.3d at 1053-54. As we explained in *Marx,* our "strict standard," which required both a showing of extraordinary circumstances that prevented timely filing and injustice resulting from denying an extension, *id.* at 1053 (citing *Pratt v. McCarthy,* 850 F.2d 590, 593 (9th Cir. 1988)), gave way to an equitable determination that involves consideration of the four *Pioneer* factors. *Id.* at 1054. We therefore affirmed the district court's grant of an extension of time to file a notice of appeal in *Marx* because the district court correctly considered the *Pioneer* factors. We found that the district court did not abuse its discretion,

and we said: "The district court's analysis of the *Pioneer Inv.* factors in this case, although considerably lenient to the plaintiffs, was not a clear error of judgment." *Id.*

Our court, in other cases, has also described *Pioneer*'s flexible approach, saying, for example, "we will ordinarily examine all of the circumstances involved rather than holding that any single circumstance in isolation compels a particular result regardless of the other factors." *Briones v. Riviera Hotel & Casino,* 116 F.3d 379, 382 n.2 (9th Cir. 1997); *see also Bateman v. United States Postal Serv.,* 231 F.3d 1220, 1224 (9th Cir. 2000).

We seemed to take a more narrow approach in *Kyle v. Campbell Soup Co.,* 28 F.3d 928 (9th Cir. 1994). In that case our court reversed the district court's finding of excusable neglect. We emphasized the fact that the attorney had made a mistake in interpreting rules that were not ambiguous and we focused on the particular facts of *Pioneer,* including a "dramatic ambiguity" in the notice of the filing deadline at issue. *Id.* at 931.

Our circuit's confusion is not isolated. The authorities interpreting *Pioneer* in a number of circuits are in some disarray. In fact, the confusion begins with *Pioneer* itself, and various subsequent circuit opinions have cited similar portions of *Pioneer* to support their respective but differing conclusions. The key passage in *Pioneer,* having a little something for everyone, is as follows:

> Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear that "excusable neglect" under [Bankruptcy] Rule 6(b) is a somewhat "elastic concept" and is not limited

> strictly to omissions caused by circumstances beyond the control of the movant.

507 U.S. at 392 (internal footnotes omitted).

The experience of the Seventh and Fifth Circuits is instructive. The Seventh Circuit in *Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132 (7th Cir. 1996), dismissed an appeal for lack of jurisdiction because the notice was not filed within the 30 days required by the Rule. In that case the attorney had missed the deadline for filing a motion under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment and filed a motion to extend the time. The district court denied this motion because no extension is allowed under Rule 59. The time for filing a notice of appeal expired, however, while the motion was pending before the district court, and so the attorney moved for an extension under Rule 4. The district court granted the extension of time to appeal, but the Seventh Circuit reversed. *Id.* at 133. The *Prizevoits* majority cited *Pioneer* for the proposition that "excusable neglect' is not limited to situations where the failure to timely file 'is due to circumstances beyond the control of the filer,'" *id.* at 134 (quoting *Pioneer,* 507 U.S. at 391), but limited the reach of *Pioneer* to such things as "plausible misinterpretations of ambiguous rules." *Id.* The majority then concluded: "Here the rule is crystal clear, the error egregious, the excuses so thin as to leave the lapse not only unexcused but inexplicable. If there was 'excusable' neglect here, we have difficulty imagining a case of inexcusable neglect." *Id.*

Judge Eschbach's dissent also relied on *Pioneer* and criticized the majority's choice "not to address the impact of *Pioneer* on our past decisions." *Id.* at 136. The dissent

said: "In Pioneer, the Court held that attorney negligence may, in certain circumstances, constitute 'excusable neglect,' considerably liberalizing its meaning and prescribing a new analytical test." *Id.*

In the Fifth Circuit, a majority relied on *Prizevoits* in *Midwest Employers Cas. Co. v. Williams,* 161 F.3d 877 (5th Cir. 1998), over a strong dissent by Judge Garza. Judge Garza cited authority, seemingly contrary to the majority, from both the Fifth and Seventh Circuits, interpreting the equitable factors of *Pioneer. Id.* at 882-84, 885. He cited *United States v. Evbuomwan,* 36 F.3d 89 (5th Cir. 1994) (unpublished opinion) (reported at 36 F.3d 89 (table case)),[2] "where the court found that the district court did not abuse its discretion in finding that a good faith misinterpretation of plain rules was excusable neglect." He also cited *Lackey v. Atlantic Richfield Co.,* 990 F.2d 202, 205 (5th Cir. 1993), where the court found that the district court did not abuse its discretion in finding excusable neglect because the attorney's obvious error was mitigated by the lack of prejudice to the nonmovant and the shortness of the delay. Finally, he cited *United States v. Brown,* 133 F.3d 993 (7th Cir. 1998), where the Seventh Circuit affirmed the district court's finding that an attorney's confusing of state rules with federal rules amounted to excusable neglect. *Id.* at 996. The Seventh Circuit said: "*Pioneer* made clear that the standard is a balancing test, meaning that a delay might be excused even where the reasons for the delay are not particularly compelling." *Id.* at 997.

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[2] Although *Evbuomwan* is an unpublished opinion, Judge Garza noted that, under Fifth Circuit Rule 47.5.3, it was binding precedent. *Midwest Employers Cas. Co.,* 161 F.3d at 882 n.7.

The Eleventh Circuit seems to have set forth a more categorical test. In *Advanced Estimating System, Inc. v. Riney,* 130 F.3d 996 (11th Cir. 1997), the court stated: "The ancient legal maxim continues to apply: ignorance of fact may excuse; ignorance of law does not excuse. Accordingly, [Appellant's] counsel's misunderstanding of the law cannot constitute excusable neglect." *Id.* at 999 (citations omitted). That decision seemed to move the Eleventh Circuit back toward the approach it had taken before *Pioneer,* and which *Pioneer* rejected, i.e., excusable neglect is limited to matters beyond the control of the attorney. *See In re Analytical Systems,* 933 F.2d 939, 942 (11th Cir. 1991) (reciting the Eleventh Circuit's pre-*Pioneer* standard for establishing excusable neglect); *Pioneer,* 507 U.S. at 387 n.3 (citing *In re Analytical Sys.* as an example of a court that had taken a narrow view of excusable neglect). In *Pioneer,* the Supreme Court rejected "a bright-line rule of the sort embraced by some Courts of Appeals, erecting a rigid barrier against late filings attributable in any degree to the movant's negligence" as "irreconcilable with our cases." 507 U.S. at 395 n.14.

Despite this confusion, there appears to be general agreement on at least one principle: the standard of review. We review for abuse of discretion a district court's decision to grant or deny a motion for an extension of time to file a notice of appeal. *Marx,* 87 F.3d at 1054; *see also Pioneer,* 507 U.S. at 398 ("To be sure, were there any evidence of prejudice to petitioner or to judicial administration in this case, or any indication at all of bad faith, we could not say that the Bankruptcy Court abused its discretion in declining to find the neglect to be 'excusable.'"); *Kyle,* 28 F.3d at 930; *Silivanch v. Celebrity Cruises, Inc.,* 333 F.3d 355, 362 (2d Cir. 2003); *Midwest*

Employers Cas. Co., 161 F.3d at 879; *Advanced Estimating Sys.*, 130 F.3d at 997. We must therefore affirm unless we are left with the definite and firm conviction that the lower court committed a clear error of judgment in the conclusion it reached after weighing the relevant factors. *Marx*, 87 F.3d at 1054.

In this case the mistake itself, the misreading of the Rule, was egregious, and the lawyer undoubtedly should have checked the Rule itself before relying on the paralegal's reading. Both the paralegal and the lawyer were negligent. That, however, represents the beginning of our inquiry as to whether the negligence is excusable, not the end of it. The real question is whether there was enough in the context of this case to bring a determination of excusable neglect within the district court's discretion.

We therefore turn to examining the *Pioneer* factors as they apply here. The parties seem to agree that three of the factors militate in favor of excusability, and they focus their arguments on the remaining factor: the reason for the delay. Appellee Andrews characterizes the reason for the delay as the failure of a "carefully designed" calendaring system operated by experienced paralegals that heretofore had worked flawlessly. Appellant Pincay, on the other hand, stresses the degree of carelessness in the failure to read the applicable Rule.

We recognize that a lawyer's failure to read an applicable rule is one of the least compelling excuses that can be offered; yet the nature of the contextual analysis and the balancing of the factors adopted in *Pioneer* counsel against the creation of any rigid rule. Rather, the decision whether to grant or deny an extension of time to file a notice of appeal should be entrusted to the discretion of

the district court because the district court is in a better position than we are to evaluate factors such as whether the lawyer had otherwise been diligent, the propensity of the other side to capitalize on petty mistakes, the quality of representation of the lawyers (in this litigation over its 15-year history), and the likelihood of injustice if the appeal was not allowed. Had the district court declined to permit the filing of the notice, we would be hard pressed to find any rationale requiring us to reverse.

Pioneer itself instructs courts to determine the issue of excusable neglect within the context of the particular case, a context with which the trial court is most familiar. Any rationale suggesting that misinterpretation of an unambiguous rule can never be excusable neglect is, in our view, contrary to that instruction. "[T]he right way, under *Pioneer,* to decide cases involving ignorance of federal rules is with an 'elastic concept' equitable in nature, not with a per se rule." *Pincay v. Andrews,* 351 F.3d 947, 953 (9th Cir. 2003) (Kleinfeld, J., dissenting).

We are also mindful that Rule 4 itself provides for leniency in limited circumstances. It could have been written more rigidly, allowing for no window of opportunity once the deadline was missed. Many states' rules provide for an extension of the time for filing a notice of appeal under few, if any, circumstances. *See, e.g.,* Ariz. R. Civ. App. P. 9 (providing for an extension of time to file a notice of appeal only if a party did not receive notice of the entry of judgment and no party would be prejudiced); *Matter of Appeal in Pima County Juvenile Action No. S-933,* 660 P.2d 1205, 1207 (Ariz. 1982) ("Excusable neglect affords no basis for relief from the dismissal of an untimely appeal."); Cal. R. Ct. 3 (listing circumstances in which the time to appeal is extended and not including an

extension for excusable neglect); *In re Hanley's Estate,* 142 P.2d 423, 424-25 (Cal. 1943) ("In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal even to relieve against mistake, inadvertence, accident, or misfortune.") (internal citations omitted). The federal rule is a more flexible one that permits a narrow 30-day window for requesting an extension, and the trial court has wide discretion as to whether to excuse the lapse.

We understand several of our sister circuits have tried to fashion a rule making a mistake of law per se inexcusable under Rule 4. *See, e.g., Silivanch,* 333 F.3d at 368-69 (quoting *Weinstock v. Cleary, Gottlieb, Steen & Hamilton,* 16 F.3d 501, 503 (2d Cir. 1994), which in turn quotes a series of pre-*Pioneer* cases including *In re Cosmopolitan Aviation Corp.,* 763 F.2d 507, 515 (2d Cir. 1985)) ("'[t]he excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules.'"); *Advanced Estimating Sys.,* 130 F.3d at 998 ("[A]n attorney's misunderstanding of the plain language of a rule cannot constitute excusable neglect."). *Prizevoits,* 76 F.3d at 133 ("An unaccountable lapse is not excusable neglect."); We agree that a lawyer's mistake of law in reading a rule of procedure is not a compelling excuse. At the same time, however, a lawyer's mistake of fact, for example, in thinking the government was a party to a case and that the 60-day rule applied for that reason, would be no more compelling.

We are persuaded that, under *Pioneer,* the correct approach is to avoid any per se rule. *Pioneer* cautioned against "erecting a rigid barrier against late filings attributable in any degree to the movant's negligence." 507 U.S. at 395 n.14. There should similarly be no rigid legal rule

against late filings attributable to any particular type of negligence. Instead, we leave the weighing of *Pioneer's* equitable factors to the discretion of the district court in every case.

We hold that the district court did not abuse its discretion in this case. Therefore, the district court's order granting the defendant's motion for an extension of time to file the notice of appeal is AFFIRMED. The merits of the appeal are before the three judge panel in appeal number 02-56491. The panel should proceed to decide that appeal.

BERZON, Circuit Judge, concurring:

Although I join the majority opinion in full, I write separately to briefly emphasize the two points that I believe dispositive of this case and that explain why I cannot agree with an otherwise persuasive dissent.

First, in his dissent, Judge Kozinski concludes that "[m]ost of the work" is done by *Pioneer's* third factor – the reason for the delay. *Post* at 15914. But *Pioneer* portends a balancing test, and does not ascribe determinative significance to *any* single factor. In other words, whether neglect is" excusable" is the conclusion one reaches after considering the pertinent factors, not an independent element with moral content. *Pioneer* thus indicates that a district court may find neglect "excusable" if it is caught quickly, hurts no one, and is a real mistake, rather than one feigned for some tactical reason – *even if* no decent lawyer would have made that error. There is no linguistic flaw in terming such errors "excusable," meaning nothing more than "appropriate to excuse."

Second, even if I agreed with the dissent that the defendants had to show "something" in satisfaction of *Pioneer*'s third prong, I would hold that there is "something" here. The dissent's position is seemingly that, for neglect to be excusable, the reason for the error must be one that an appellate court views as understandable or sympathetic – a "good" reason in some respect. Such an assessment is necessarily subjective. The examples Judge Kozinski gives indicate that courts have recognized personal difficulties, client communication problems, and confusing rules as "good" reasons – as "something" – that weigh positively in the *Pioneer* balance, while viewing misreading clear rules as not a "good" reason – not "something."

If this were an essential inquiry, I would hold that the district court did not abuse its discretion in holding that even the complete misfiring of a generally well-conceived calendaring system is "something" – as compared, for example, to letting court orders pile up on desks, with no effort to read them or calculate appeal deadlines (a not-so-hypothetical hypothetical, as we have had such cases). Here, the lawyer did within the appeal deadline period make an effort, although an exceedingly poor one, to ascertain the appeal deadline; he did not ignore the issue entirely.

The existence of *some* effort to meet appeal deadlines is not simply evidence of good faith. The good faith consideration goes to the absence of tactical or strategic motives, not to the degree of negligence. Here, as Judge Kozinski recognizes, given the lack of prejudice or delay and the absence of *any* evidence of ulterior motives, "defendants need not have offered a terribly good countervailing reason to make their neglect excusable." *Post* at 15914. In my

view, a district court does not abuse its discretion by regarding the existence of a system designed to prevent the error from happening – even a system that is overly reliant on non-lawyers and that entirely misfired in this instance (probably as a result of over-reliance on non-lawyers) – as "something" weakly positive in the reason category.

I therefore join the opinion of the court in its entirety.

KOZINSKI, Circuit Judge, with whom Judges RYMER and McKEOWN join, dissenting:

We must never forget that it is "excusable neglect" we are expounding. Before *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380 (1993), four circuits had forgotten; they interpreted this phrase as "requiring a showing that the delay was caused by circumstances beyond the movant's control." *Id.* at 387 n.3. But how could circumstances beyond one's control be neglect? A jurisprudence that refused to excuse anything one could fairly call "neglect" was inconsistent with the clear text of rules that, by their terms, provide exceptions for "excusable neglect." *Pioneer* corrected the error and gave us a four-part test for recognizing when admitted neglect – inadvertence, miscalculation, negligence, carelessness – can nonetheless be excused.

But if excusable neglect must be neglect, it must also be excusable. *Pioneer*'s four-part test isn't just a black box into which we throw (1) prejudice to the adverse party, (2) the length of the delay, (3) the reason for the delay, and (4) the good faith of the movant, and accept whatever comes out. When all the weighing and balancing is done, we must have something we can say with a straight face is excusable. Factors one, two and four will almost always cut one

way: Delays are seldom long, so prejudice is typically minimal. Bad-faith delay is rare, given that we're only dealing with "neglect," not deliberate flouting of the rules, *see Pioneer*, 507 U.S. at 387-88 – though flouting does happen on occasion. *See Laurino v. Syringa Gen. Hosp.*, 279 F.3d 750, 758 (9th Cir. 2002) (Kozinski, J., dissenting). Most of the work, then, is done by factor three, the most important one, *see, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000), which may balance out any findings under the other factors: The greater the delay, the prejudice to the adverse party and the movant's bad faith, the better a reason the movant must show for having missed the deadline.[1] In this case, the district court found there was no prejudice to Pincay, the delay was short and there was no bad faith. Thus, defendants need not have offered a terribly good countervailing reason to make their neglect excusable.

But they needed to show *something*. Was this a class action that bristled with client "consultation difficulties"? *See Marx v. Loral Corp.*, 87 F.3d 1049, 1053-54 (9th Cir. 1996). Was the client distracted by a divorce and job

[1] We know from the Supreme Court's opinion in *Pioneer* that not all excuses are created equal. Respondents in *Pioneer* offered two excuses for failing to file a timely proof of claim: (1) "[R]espondents' counsel . . . was experiencing upheaval in his law practice at the time of the bar date," 507 U.S. at 398; and (2) the notice of the bar date contained a "dramatic ambiguity," *id.* (quoting *Brunswick Assocs. Ltd. P'ship v. Pioneer Inv. Servs. Co.* (*In re Pioneer Inv. Servs. Co.*), 943 F.2d 673, 678 (6th Cir. 1991)) (internal quotation marks omitted). The Court dismissed the first excuse as carrying "little weight," *id.*, but found the second one compelling. This passage in *Pioneer*, where the Court performed precisely the kind of review we are doing today, precludes the majority's argument that *any* excuse, or *no* excuse, can be sufficient to support a finding of excusable neglect.

change, and had he lost his lawyer to boot? *See Laurino,* 279 F.3d at 753. Was the rule confusing or notice of the deadline unusual? *See Pioneer,* 507 U.S. at 398. No, no and no. The action was not complicated; the lawyer worked at a large, sophisticated law firm; and the rule is as clear as legal rules get:

> In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

Fed. R. App. P. 4(a)(1)(A). As the text indicates, the rule only has three exceptions. The first is that the notice of appeal may be filed in 60 days instead of 30 if "the United States . . . is a party." Fed. R. App. P. 4(a)(1)(B). It isn't. The second exception only applies if certain motions are filed. Fed. R. App. P. 4(a)(4). None were. The third exception applies to inmates, which defendant is not. Fed. R. App. P. 4(c). Thus, the number of days to file a notice of appeal was 30 – no ifs, ands or buts about it. There surely are complicated rules in the law, but this isn't one of them. The majority agrees: "[A]ny lawyer or paralegal should have been able to read the rule correctly." Maj. op. at 15902.

Rather than present a reason for the neglect, defendants call the error "'inexplicable,'" Appellees' Br. at 32 (quoting Appellants' Br. at 10), and "aberrational." *Id.* But "inexplicable" and "aberrational" are not synonyms for excusable. In such circumstances, I have trouble seeing how the balance can tilt in favor of excusability.

Defendants do point to one exonerating circumstance, though it is not so much a "reason" for the delay as a proof

of their good faith, which we assume anyway: their lawyer's "[c]arefully [d]esigned and [s]taffed," "reliabl[e] and successful[]" calendaring system. Appellees' Br. at 7-8; *see also id.* at 10 (describing counsel's additional efforts to avoid error). But this doesn't help them: Extreme good faith has no exonerating power of its own; bad faith can sink an excusable neglect claim, and good faith is nothing but the absence of this negative. In any event, the calendaring system here did not fail. The wrong date was calendared with meticulous efficiency and accuracy. But the lawyer did fail by abdicating his basic duty – to determine the applicable appeal deadline based on a clear-as-day rule.

At bottom, what the sophisticated-calendaring-system excuse comes down to is that the lawyer didn't bother to read the rule; instead, he relied on what a calendaring clerk told him. While delegation may be a necessity in modern law practice, it can't be a lever for ratcheting down the standard for professional competence. If it's inexcusable for a competent lawyer to misread the rule, it can't become excusable because the lawyer turned the task over to a non-lawyer. Errors made by clerks performing lawyerly functions are probably less excusable than those made by the lawyer himself; they certainly can't be more so.

The majority may be right that any competent lawyer or clerk should have been able to read the rule correctly, but that is quite different from saying that a lawyer and a non-lawyer would be equally likely to *mis* read the rule. Studying and practicing law develops certain skills and habits of mind that, one hopes, make lawyers more careful than non-lawyers about reading rules. When a lawyer turns this function over to a non-lawyer, it increases the

likelihood an error will be made. Had the lawyer in this case read the rule himself, rather than relying on what a clerk told him, he doubtless would have gotten it right. Indeed, the 30-day rule for appeals in federal court is so well known among federal practitioners that, had the lawyer but *thought* about the rule, rather than relying entirely on the calendaring clerk's representation, he would surely have realized that the 60-day period is wrong. Instead, the lawyer delegated the calendaring issue to the calendaring "system," which is made up entirely of non-lawyers. If turning large chunks of law practice over to para-professionals can itself be an excuse for misreading rules, then we'll probably see more such delegation and misreading. It is the cold logic of the marketplace that conduct that is rewarded will be repeated.[2]

The Supreme Court told us in *Pioneer* that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." 507 U.S. at 392. *Pioneer* forecloses any per se rule against "mistakes construing the rules." Still, the word "usually" suggests that we should not apply the balancing test so that virtually *no* type of mistake is off limits for excusable negligence. Yet this is precisely what the majority has done here, because if this mistake is excusable, I can't

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[2] Judge Berzon suggests that "even the complete misfiring of a generally well-conceived calendaring system" is a better excuse than, say, "letting court orders pile up on desks, with no effort to read them or calculate appeal deadlines." Concur. op. at 15912. But it's not clear why Judge Berzon believes the lawyer who procrastinates his professional duties is acting inexcusably while the lawyer who foists them off onto a non-lawyer is not. Procrastination and delegation are different ways of shirking professional obligations. They both occasionally result in missed deadlines, for more or less the same reason: The lawyer paid insufficient attention to his cases.

imagine a mistake that isn't. *See Prizevoits v. Ind. Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996) ("If there was 'excusable' neglect here, we have difficulty imagining a case of inexcusable neglect."). No circuit has taken a position as charitable to lawyer errors as we do today; the majority is at odds with decisions in at least six other circuits. *See Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 369-70 (2d Cir. 2003); *Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877, 879 (5th Cir. 1998); *Prizevoits*, 76 F.3d at 134; *Lowry*, 211 F.3d at 464; *United States v. Torres*, 372 F.3d 1159, 1163-64 (10th Cir. 2004); *Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 998-99 (11th Cir. 1997).[3]

Identifying classes of cases where *Pioneer* balancing cannot excuse neglect is not, as the majority suggests, Maj. op. at 15911, adopting a per se rule. It is merely providing the sort of guidance that we are entitled and required to give district courts. This is, in fact, what the Supreme Court did in *Pioneer*: It re-weighed the factors assessed by the bankruptcy court and found an abuse of discretion. If a finding that neglect is not excusable *can* be an abuse of discretion (as the Supreme Court held in *Pioneer*), it surely makes no sense to hold that a finding of excusable neglect *can never* be an abuse of discretion (as the majority holds today). *See id.* at 15911 ("[W]e leave the weighing of *Pioneer's* equitable factors to the discretion of the district court in every case."). To do so abdicates our

[3] The D.C. Circuit has upheld a district court finding of excusable neglect for missing a deadline, but this was in the context of "a case-management decision in a complex class action, in which district court discretion is at its greatest." *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1210 (D.C. Cir. 2003).

responsibility of appellate review and, if taken literally, results in as many rules as there are district judges.[4]

I would hold that the error here – whether made by the lawyer, the calendaring clerk or the candlestick-maker – is inexcusable and dismiss the appeal as untimely.

[4] Imagine what will happen the next time we get a case on materially indistinguishable facts, except that the district court found the delay *in* excusable. Will it be just to tell the litigant that his case is lost because he happened to draw the wrong district judge?

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAFFIT PINCAY, JR., Plaintiff, v. VINCENT S. ANDREWS; ROBERT L. ANDREWS; VINCENT ANDREWS MANAGEMENT CORP., Defendants	CV 89-1445-WMB ORDER GRANTING DEFENDANTS' MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL (Filed Sep. 3, 2002)
CHRISTOPHER J. McCARRON, Plaintiffs, v. VINCENT S. ANDREWS; ROBERT L. ANDREWS; VINCENT ANDREWS MANAGEMENT CORP., Defendants.	CV 89-4965-WMB

Defendants missed the deadline to file a notice of appeal from the July 3, 2002 Order from this Court. The deadline was August 2, 2002. On August 22, 2002, defense counsel realized that he had missed the date. Defense counsel explains that he relied on the calendar clerk at his law firm to calculate the deadline, and the clerk made a mistake, applying a sixty day deadline to appeal pursuant to Fed R. App. Proc. 4(a)(1)(B) instead of the correct thirty day deadline pursuant to Fed. R. App. Proc. 4(a)(1)(A). Defendants now request relief pursuant to Fed. R. App. Proc. 4(a)(5)(A), which allows the Court to extend the time

for filing a notice of appeal if (i) a party so moves within thirty days of the expiration of the deadline, and (ii) the party shows excusable neglect or good cause.[1]

There is no dispute that defendants moved for an extension of time within thirty days of the expiration of the deadline to file a notice of appeal. Defendants claim that their conduct constitutes "excusable neglect" under *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380 (1993). Though *Pioneer* involved the construction of "excusable neglect" under the Federal Rules of Bankruptcy Procedure, Rule 9006(b)(1), the interpretation has been extended to the definition of excusable neglect under Rule 4 of the Federal Rules of Appellate Procedure. *See* 16A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3950.3 at 155 (3d ed.1999) ("It is plain that Rule 4(a)(5) must now be read in the light of what *Pioneer Investment* held about 'excusable neglect' and that earlier decisions taking a different view of the concept are no longer authoritative."); *see also Marx v. Loral Corp.*, 87

[1] Plaintiffs contend that defendants' motion should be denied because it was filed ex parte, citing, *inter alia*, *Malone v. Aveneti*, 850 F.2d 569, 572-73 (9th Cir. 1988) (holding that appeal was untimely because habeas petitioner did not give notice to the State of his motion to extend). While there is cause to deny a motion to extend time to appeal filed without notice to the opposing party, in this case plaintiffs did have notice and an opportunity to respond. Therefore, defendants' motion will not be denied on the basis that it was filed ex parte. *See* 16A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3950.3 at 137 & n.8 (3d ed 1999); *see also Bartunek v. Bubak*, 941 F.2d 726, 729 (8th Cir. 1991) (remanding the matter to the District Court to give the nonmoving party an opportunity to respond).

F.3d 1049 (9th Cir. 1996) (applying the *Pioneer* standard to the interpretation of excusable neglect under Rule 4).

Pioneer sets out a four part equitable balancing test for granting an extension based on excusable neglect: (1) whether there is prejudice to the nonmoving party, (2) the length of delay and prejudice to the efficient administration of justice, (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform, and (4) whether the moving party's conduct was in good faith. *Pioneer*, 507 U.S. at 395.

Plaintiffs concentrate their argument on the source of the mistake's being within defense counsel's control, and do not make mention of the other factors in the *Pioneer* standard for excusable neglect. These three factors will therefore be discussed only briefly.

A. Prejudice to the nonmoving party

Besides the prejudice that will always exist when a party does not receive the windfall benefit of an opponent's missed deadline, plaintiffs will not be significantly prejudiced by defendants' short delay in filing the notice of appeal.

B. Length of delay and prejudice to efficient administration of justice

Defendants argue that the appeal will actually expedite the litigation, ultimately, because the bankruptcy court will have to spend less time in its determination of the issue. Even if this argument is without merit, the delay in filing is only a few weeks, which will not prejudice the efficient administration of justice.

C. Moving party's good faith

Defendants' counsel relied on an incorrect calendaring system, and was unaware of the actual deadline. Plaintiffs do not contend that defense counsel flouted the deadline or otherwise acted in anything other than good faith.

D. Delay beyond the reasonable control of the person whose duty it was to perform

Plaintiffs argue that carelessness alone is not excusable. Some Ninth Circuit case narrowly construe "excusable neglect" even after the *Pioneer* decision. *See Committee v. Yost*, 92 F.3d 814 (9th Cir. 1996) (holding that district court had not abused discretion in denying motion to extend time to a file a motion for attorney's fees because unfamiliarity with the rules did not amount to excusable neglect); *Kyle v. Campbell Soup Co.*, 28 F.3d 928 (9th Cir. 1994) (holding that plaintiff's motion for attorney's fees was untimely, and misapplication of the rule did not constitute excusable neglect).[2]

However, the prevailing view – especially regarding Rule 4 – is that attorney mistakes made in good faith with no prejudice to the other party are excusable neglect. *See Marx*, 87 F.3d 1049. *Pioneer* makes clear that "reading [the rule] inflexibly to exclude every instance of an inadvertent or negligent omission would ignore the most natural meaning of the word 'neglect' and would be at odds with the accepted meaning of that word in analogous contexts." 507 U.S. at 394-95. Thus, mistake or miscalculation are

[2] Plaintiffs cite to some other cases that pre-date the *Pioneer* decision; these cases are not discussed herein because they are no longer authoritative or persuasive.

legitimate reasons to extend time to file an appeal under Rule 4(a)(5)(A).

Plaintiffs argue that the mistake was not due to ambiguity of the order or the rule, as was the situation in *Pioneer*; rather, defendants miscalculated a clear deadline from a basic rule applied to an unambiguous order. Though the Court in *Pioneer* did discuss the ambiguities of the Order and the Rule in that case, it did not base its decision on the justifiability of the mistake. The determination is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." 507 U.S. at 395; *see also Marx*, 87 F.3d at 1054.

Plaintiffs' argument also ignores the Ninth Circuit authority holding that an attorney's mistake in calendaring the Rule 4 appeal deadline may constitute excusable neglect. In *Marx*, the Court rejected the non-moving party's argument that the Court should reverse the District Court's granting of an extension of time because "the late filing was solely attributable to the attorney's calendaring miscalculation." 87 F.3d at 1054. Instead, the Court held that it was not an abuse of discretion to grant the extension of time on this basis. *Id.*

V. CONCLUSION

For the reasons set forth above, the Court GRANTS defendants' motion for an extension, so that the notice of appeal filed on August 27, 2002 is timely.

IT IS SO ORDERED.

Date: Aug. 30, 2002

/s/ Wm. Matthew Byrne, Jr.
Wm. Matthew Byrne, Jr.
United States District
Judge

Cite as 351 F.3d 947 (9th Cir. 2003)

Laffit PINCAY, Jr.;
Christopher J. McCarron,
Plaintiffs-Appellant,

v.

Vincent S. ANDREWS; Robert Andrews;
Vincent Andrews Management Corp.,
Defendants-Appellees.

No. 02-56577.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 16, 2003.

Filed Dec. 10, 2003.

Neil Papiano, Los Angeles, CA, for the plaintiffs-appellants.

David Boies, Armonk, NY, for the defendants-appellees.

Appeal from the United States District Court for the Central District of California; William Matthew Byrne, Senior Judge, Presiding. D.C. Nos. CV-89-01445-WMB, CV-89-04965-WMB.

Before NOONAN, KLEINFELD, and WARDLAW, Circuit Judges.

NOONAN, Circuit Judge.

Lafitt Pincay, Jr. and Christopher J. McCarron ("Pincay") appeal the order of the district court retroactively extending the time in which Vincent S. Andrews, Robert L. Andrews, and Vincent Andrews Management Corp. ("Andrews") might appeal from an adverse judgment of the

district court. Holding that the district court made a mistake of law, we reverse the order of the district court.

PROCEEDINGS

In litigation that began in 1989, Pincay sued Andrews for financial injuries in violation of RICO and California law. In 1992, a jury returned verdicts in Pincay's favor on both the RICO and California counts. Pincay was ordered to elect one remedy or the other; he chose the RICO judgment. On appeal, this judgment was reversed on the basis of the federal statute of limitations. *Pincay v. Andrews,* 238 F.3d 1106 (9th Cir.2001). On remand, Pincay elected the state remedy. Judgment was entered in his favor on July 3, 2002.

On July 10, the nonlawyer calendaring clerk in the large law firm representing Andrews faxed the lawyer supervising the case a copy of the judgment. This lawyer was not in the office, and an exchange of e-mails resulted:

Lawyer to calendaring clerk:

> PS what's going on with that Andrews judgment? Was there a proposed form of judgment submitted that we missed? Don't we get a chance to object? And when does our time run to notice the appeal? I know you're out today, but please call on Friday to discuss.

Calendaring clerk to lawyer:

> As for Andrews, a proposed judgment was served and filed on 10/11/01. We have it in our files. I'll have to check to see if we objected, but I don't see anything. I'll check our motion papers on their motion for entry of judgment. According to FRAP rule 4, we get 60 days from date of entry of judgment, which was

> 7/3/02. 60 days would run us to 9/1, which is a Sunday. So 9/2 would be the last date to file a Notice of Appeal.

To this message, the clerk added:

> Oops, September 2 is Labor Day, so make it Sept. 3.

Lawyer to calendaring clerk:

> To be safe, let's calendar it for the Thursday before Labor Day [i.e., August 29].

The clerk replied he had done so. According to the lawyer's declaration in this case, he "later confirmed that the accelerated deadline was on the calendar."

On August 22, the lawyer received a message from counsel acting for Andrews in his bankruptcy case in Connecticut. The message informed him that Pincay, a claimant in the bankruptcy, had filed a notice that the California judgment against Andrews was final as the appeal period had expired. On August 25, Andrews filed notice of a motion for an extension of time in which to file an appeal from the judgment of July 3. As the district court put Andrews' argument, "Defense counsel explains that he relied on the calendar clerk at his law firm to calculate the deadline, and the clerk made a mistake." Andrews contended that this mistake constituted "excusable neglect."

On August 27, Andrews filed his appeal. On August 30, the district court found Andrews' appeal to have been delayed by excusable neglect and granted the motion to extend so that the August 27 notice of appeal became timely.

Pincay appeals the order extending the time.

ANALYSIS

The Federal Rules of Appellate Procedure provide:

Rule 4. Appeal as of Right – When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

Under the rule, Andrews' appeal should have been filed by August 2 and was in fact 25 days late.

Section (a)(5) of Rule 4, however, provides as follows:

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) . . . that party shows excusable neglect or good cause.

Andrews' counsel did not show good cause for his failure to file on time, nor can his action be classified as excusable neglect. What counsel did was to delegate a professional task to a nonprofessional to perform. Knowledge of the law is a lawyer's stock in trade. Bureaucratization of the law such that the lawyer can turn over to nonlawyers the lawyer's knowledge of the law is not acceptable for our profession.

Authoritative guidance as to the meaning of "neglect" has been provided by the Supreme Court construing a bankruptcy rule permitting late filing on a showing of excusable neglect. The Court stated:

> The ordinary meaning of "neglect" is "to give little attention or respect" to a matter, or, closer to the point for our purposes, "to leave undone or unattended to *esp[ecially] through carelessness.*" Webster's Ninth New Collegiate Dictionary 791 (1983) (emphasis added). The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. . . . Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.

Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 388, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). Commenting further on "excusable neglect" in Fed.R.Civ.P. 6(b), the Court added:

> Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear that "excusable neglect" under rule 6(b) is a somewhat "elastic concept" and is not limited strictly to omissions caused by circumstances beyond the control of the movant.

Id. at 392, 113 S.Ct. 1489 (footnote omitted).

In *Kyle v. Campbell Soup Co.,* 28 F.3d 928 (9th Cir.1994), we considered "excusable neglect" in Fed.R.Civ.P. 6(e) in a case where a motion for attorneys' fees was 2 days late and the district court had found excusable neglect because the plaintiff's attorney had misinterpreted a local rule to incorporate a federal rule of procedure. We found the

misinterpretation of the rules to be an inexcusable mistake of law and reversed the district court. We said:

> Although the Court in *Pioneer* recognized that "excusable neglect" is a flexible, equitable concept, the Court also reminded us that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer,* 507 U.S. at [392], 113 S.Ct. at 1496.

Id. at 931.

In *Marx v. Loral Corp.,* 87 F.3d 1049 (9th Cir.1996), we considered excusable neglect under Fed. R.App. P. 4(a)(5). The district court found excusable neglect in plaintiffs' counsel encountering difficulties in arranging a meeting with the class of plaintiffs they represented. The appeal had been filed one day late. The appellees argued "somewhat persuasively" that the delay was due solely "to the attorney's calendaring miscalculation." *Id.* at 1054. We did not decide what caused the delay but simply stated that "this court cannot reverse the district court's ruling unless it has a definite and firm conviction that the lower court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id.* at 1054. As we were in doubt, and not definitely and firmly convinced of the calendaring error, we affirmed the district court.

In *Briones v. Riviera Hotel & Casino,* 116 F.3d 379 (9th Cir.1997), we held that a pro se plaintiff's opposition, 3 months late, to a motion to dismiss, might be due to excusable neglect and that relief would not be summarily denied; we reversed the district court's denial of relief and remanded.

In *Bateman v. United States Postal Serv.*, 231 F.3d 1220 (9th Cir.2000), we considered "excusable neglect" under Fed.R.Civ.P. 60(b)(1). A former employee of the Postal Service was suing his employer. He was represented by a lawyer who on August 10 left the country to attend to a family emergency in Lagos, Nigeria, returning August 29. Informed that the lawyer was going to be away, the Postal Service filed a motion for summary judgment on August 7. The deadline for filing a response was August 21. No response was made by the lawyer absent in Nigeria. On August 28, the Postal Service, not mentioning its knowledge of the lawyer's absence, moved for judgment on its unopposed motion. The motion was granted on September 3. The district court refused to relieve the plaintiff of the judgment on the grounds of excusable neglect by the lawyer. Stressing the failure of the district court to consider the equitable factors enumerated by the Supreme Court in *Pioneer,* we made the equitable analysis ourselves and found the lawyer's neglect excusable because of the lack of prejudice to the Postal Service and the small impact of the delay on the judicial system. *Id.* at 1225.

As he did in the district court, Andrews focuses on the mistake made by the calendaring clerk – an unexplained aberration by a man experienced in court procedures. The lawyer's only excuse is that he relied on this non-lawyer clerk. But this focus is wrong. The focus must be on the lawyer. Paralegals and other nonlawyers perform services in firms; many of the services involve knowledge of the law and were once performed by junior lawyers. The economy of such delegation is evident. But delegation cannot be made of responsibility for professional knowledge. When the lawyer delegates, he retains responsibility for knowing the law.

The lawyer, as he states in the e-mail quoted above, was unaware of the law. Not knowing the law governing one's practice is different from mere neglect, and it cannot be classed as excusable neglect. No axiom is more familiar than, "Ignorance of the law is no excuse." This ordinary rule is not a per se rule, but it ordinarily applies to those whose profession is the law.

Nowhere in the proceedings in this case does the lawyer state that he had read the federal rules governing appeals. Nowhere does he state that he misremembered them. All that the lawyer states is that he relied on his clerk. A lawyer's obligation to know relevant law cannot be delegated in this way to a nonlawyer. A solo practitioner would not even be in a position to attempt this kind of delegation. Membership in a large firm does not give the lawyer leave to delegate to others the basic rules of the lawyer's practice.

We do not have a pro se plaintiff as in *Briones.* We do not have here circumstances like those in *Bateman* where the churlish conduct of counsel for the government took advantage of the known absence of opposing counsel. We do not have a case like *Marx,* where we could not second guess the district court's excusing of a one day slip. However, we do have a case like *Kyle,* where we found inexcusable neglect because counsel "committed a mistake in interpreting and applying the Local Rules and Rule 6(e) of the Federal Rules of Civil Procedure, which were *not* ambiguous." *Kyle,* 28 F.3d at 931. Federal Rule of Appellate Procedure 4(a)(5) is no more ambiguous than the rule at issue in *Kyle.* Neither *Marx* nor *Bateman* nor any other case cited to us has changed *Kyle'* s rule. It is consonant with *Pioneer'* s teaching that "ignorance of the rules or mistakes construing the rules do not usually constitute

'excusable' neglect." *Pioneer,* 507 U.S. at 388, 113 S.Ct. 1489. Here there was ignorance of the rules, compounded by delegation of knowledge of the rules to a nonlawyer for whom responsibility was not accepted.

Accordingly, the judgment of the district court is REVERSED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

In my view, the majority makes two mistakes. First, it takes too constricted a view of the Supreme Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership,*[1] and second, it accords insufficient deference to the district court's exercise of discretion.

I certainly do not quarrel with the majority's exasperation at an experienced lawyer from a large and well-staffed firm carelessly delegating the reading of appellate rules to a non-lawyer and failing adequately to supervise. And I note with approval that the majority indicates this was a "large law firm," distinguishing the negligence here from that of a solo practitioner, who "would not even be in a position to attempt this kind of delegation."[2] The majority thus leaves room, in a solo practitioner's case, for the court to consider whether the decision in the case at bar should be distinguished. A lawyer in a large firm who was out of town could presumably have some young associate work as late into the night as necessary to discover, read,

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[1] *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993).

[2] Maj. Op. at 948, 951.

and follow Federal Rule of Appellate Procedure 4, but a solo would be unable to call upon such useful help.

My dissent is directed to the proposition that compels the majority's conclusion: "Not knowing the law governing one's practice is different from mere neglect, and it cannot be classed as excusable neglect,"[3] especially when compounded by delegation of that knowledge to a non-lawyer. This holding is erroneous. Ignorance of the law and negligent delegation can indeed be classed as excusable neglect. And ignorance of the law plus negligent delegation – not knowing that the deadline for filing a notice of appeal in a civil case where the government is not a party is 30 days, not 60, and relying on a calendar clerk's reading of Federal Rule of Appellate Procedure 4 – is the precise error that the Andrews' lawyer made.

The majority fleshes out this concept of ignorance of the law, qualifying it with its concern that the lawyer delegated professional tasks to a non-lawyer to perform. Delegation may be negligent, but negligence, under *Pioneer,* can be "excusable neglect." There is no difference in principle between negligent mistake of law and negligent supervision. All professionals delegate. Medical doctors delegate many traditional duties to physician's assistants and nurses. Lawyers and judges delegate to associates, law clerks, interns, paralegals, calendar clerks, and secretaries. Lay calendar clerks commonly set trial dates for district judges, who delegate to them to avoid Speedy Trial Act errors. Of course delegation can be excessive, but what matters is the degree of supervision.

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[3] Maj. Op. at 951.

The Supreme Court in *Pioneer* expressly approved of the principle that "ignorance of the rules" may sometimes be "excusable neglect."[4] The Court rejected the view taken by some courts that "excusable neglect" had to have some cause beyond the reasonable control of the attorney, and held instead that "neglect" included "faultless omissions to act and, more commonly, omissions caused by carelessness."[5] This definition encompasses missing a filing deadline because of "negligence." Thus, "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control."[6] Because the Supreme Court has stated that "ignorance of the rules"[7] *may* constitute

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[4] *Pioneer,* 507 U.S. at 392, 113 S.Ct. 1489.

[5] *Id.* at 388, 113 S.Ct. 1489.

[6] *Id. See* Fed. R.App. P. 4(a)(5) advisory committee's note (2002 Amendments) ("The good cause and excusable neglect standards have 'different domains.' *Lorenzen v. Employees Retirement Plan,* 896 F.2d 228, 232 (7th Cir.1990). They are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault – excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.").

[7] *Id.* at 391-92, 113 S.Ct. 1489. The *Pioneer* citation is drawn from this discussion:

> Under [Federal Rule of Civil Procedure] 6(b), where the specified period for the performance of an act has elapsed, a district court may enlarge the period and permit the tardy act where the omission is the "result of excusable neglect." As with [Federal Rule of Bankruptcy Procedure] 9006(b)(1), there is no indication that anything other than the commonly accepted meaning of the phrase was intended by its drafters. It is not surprising, then, that in applying Rule 6(b), the Courts of Appeals have generally

(Continued on following page)

excusable neglect, it is not permissible for us to hold that "it *cannot* be classed as excusable neglect."[8]

To be sure, ignorance is not a free pass. The Court says that various kinds of carelessness including "ignorance of the rules . . . do not usually constitute 'excusable neglect.'"[9] Thus in *Speiser, Krause & Madole P.C. v. Ortiz* we noted, and affirmed a district court's refusal to depart from, "the general rule that a mistake of law does not constitute excusable neglect."[10] However, the right way, under *Pioneer,* to decide cases involving ignorance of federal rules is with an "elastic concept" equitable in nature, not with a per se rule such as the one on which the majority relies.[11] We are not free to impose a per se rule.[12]

Under *Pioneer,* the determination of whether a careless omission, including one resulting from a lawyer's ignorance of the rules, is "'excusable' . . . is at bottom an equitable one, taking account of all relevant circumstances

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recognized that "excusable neglect" may extend to inadvertent delays. Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear that "excusable neglect" under Rule 6(b) is a somewhat "elastic concept" and is not limited strictly to omissions caused by circumstances beyond the control of the movant.

507 U.S. at 391-92 (citations omitted).

[8] Maj. Op. at 951 (emphasis added).

[9] *Pioneer,* 507 U.S. at 392, 113 S.Ct. 1489.

[10] *Speiser, Krause & Madole P.C. v. Ortiz,* 271 F.3d 884, 886 (9th Cir.2001) (affirming under the abuse-of-discretion standard a district court's denial of a motion to set aside a default and enlarge the time to answer).

[11] *Pioneer,* 507 U.S. at 392, 113 S.Ct. 1489 (citing 4A C. Wright & A. Miller, Federal Practice and Procedure § 1165, p. 479 (2d ed.1987)).

[12] *Id.* at 392-95, 113 S.Ct. 1489.

surrounding the party's omission."[13] Among these are "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."[14]

The majority opinion does not discuss these equitable factors that *Pioneer* says to take into account. The district court discussed each of them explicitly and carefully. For the first, second, and fourth factors, it found that (1) "[b]esides the prejudice that will always exist when a party does not receive the windfall benefit of an opponent's missed deadline, plaintiffs will not be significantly prejudiced by defendants' short delay in filing the notice of appeal"[15]; (2) "the delay in filing is only a few weeks, which will not prejudice the efficient administration of justice";[16] and (4) "[p]laintiffs do not contend that defense counsel flouted the deadline or otherwise acted in anything other than good faith."[17] In a page and a half of detailed analysis on the third factor, the district court concluded that although "[s]ome Ninth Circuit cases narrowly construe 'excusable neglect' even after the *Pioneer* decision.[18] . . . the prevailing view – especially regarding Rule 4 – is that

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[13] *Id.* at 395, 113 S.Ct. 1489.

[14] *Id.*

[15] *Pincay v. Andrews*, No. CV 89-1445-WMB (C.D.Cal. Sept. 3, 2002) (order granting defendants' motion for extension of time to file notice of appeal).

[16] *Id.*

[17] *Id.*

[18] The district court cites to *Kyle v. Campbell Soup Co.*, 28 F.3d 928 (9th Cir.1994), and *Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814 (9th Cir.1996).

attorney mistakes made in good faith with no prejudice to the other party are excusable neglect."[19]

The district court got the law right. As it noted, a number of our opinions are consistent with the view I now urge here, and inconsistent with the position taken by the majority. The majority discusses and distinguishes *Marx v. Loral Corp.*,[20] *Briones v. Riviera Hotel & Casino*,[21] and *Bateman v. United States Postal Service*.[22] To its discussion, I add this critical – and dispositive – insight from *Marx:* "Although *Pioneer Inv.* arose in the context of the Bankruptcy Rules, its *rationale* would seem to apply equally to the Federal Rules of Appellate Procedure."[23] Applying the rationale of *Pioneer* to Rule 4(a)(5), *Marx* concluded that "[t]he district court's analysis of the *Pioneer Inv.* factors in this case, although considerably lenient to the plaintiffs, was not a clear error of judgment."[24] Just as we directed in *Bateman*, the district court properly "conduct[ed] the equitable analysis laid out in *Pioneer* and *Briones*."[25]

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[19] *Pincay v. Andrews*, No. CV 89-1445-WMB (C.D.Cal. Sept. 3, 2002) (order granting defendants' motion for extension of time to file notice of appeal).

[20] *Marx v. Loral Corp.*, 87 F.3d 1049 (9th Cir.1996).

[21] *Briones v. Riviera Hotel & Casino*, 116 F.3d 379 (9th Cir.1997).

[22] *Bateman v. United States Postal Serv.*, 231 F.3d 1220 (9th Cir.2000).

[23] *Marx*, 87 F.3d at 1054 (noting that *Pioneer* had recognized the division of authority among the courts of appeals "in their interpretations of excusable neglect as found in Rule 4(a)(5) of the Federal Rules of Appellate Procedure") (internal quotation marks omitted) (emphasis added).

[24] *Marx*, 87 F.3d at 1054.

[25] *Bateman*, 231 F.3d at 1224.

Contrary to the majority's assertion that no Ninth Circuit law has changed *Kyle* ("Neither *Marx* nor *Bateman* nor any other case cited to us has changed *Kyle*' s rule."[26]), the rules *have* changed, and they have changed in the specific context of Federal Rule of Appellate Procedure 4(a)(5). *Marx* explicitly adopted and applied the changed rules of *Pioneer* to our analysis of excusable neglect in the context of Federal Rule of Appellate Procedure 4(a)(5).[27]

Kyle v. Campbell Soup Co., the case on which the majority rests its decision, cannot do the work the majority makes it do.[28] *Kyle* reads *Pioneer* narrowly, too narrowly in my present view, and too narrowly to be reconciled with our subsequent, controlling decision in *Marx*. When *Kyle* was decided, we had not yet extended the rationale of *Pioneer* from its context of ambiguities in bankruptcy proceedings to unambiguous Federal Rule of Appellate Procedure 4(a)(5), so its failure to adopt the rationale of *Pioneer* was arguably appropriate. Now that we have, post-*Kyle*, explicitly adopted and applied the rationale of *Pioneer* to Federal Rule of Appellate Procedure 4(a)(5), we cannot lay *Pioneer* aside.

Kyle is also distinguishable in another way. *Kyle* speaks to a late motion for attorneys fees, which does not go to the merits of the original litigation. Attorney fees are ancillary, and district court judges may legitimately take a less liberal approach in deciding whether ignorance of the rules constitutes excusable neglect where disposition of

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[26] Maj. Op. at 951.

[27] *Marx*, 87 F.3d at 1054.

[28] *Kyle v. Campbell Soup Co.*, 28 F.3d 928, 931-32 (9th Cir.1994).

the case on the merits will not be affected.[29] District courts commonly grant relief based on the view that it's undesirable to turn a dispute on the merits into a legal malpractice case. The decision today will prevent resolution of the appeal on the merits.

Federal Rule of Civil Procedure 1 says to construe the rules to get a "just" decision on the merits.[30] This case is an appeal on the merits of a seven-figure judgment. It may be "speedy" and "inexpensive" (at least for the court system) to prohibit an appeal from going forward, but a district court must serve all three aspects of a proper resolution – that it be *just,* speedy, and inexpensive. Justice is better attained by considering, and where appropriate reconsidering, the merits. Collateral matters such as attorneys fees do not go to the merits, the "determination of [the] action."[31]

The majority's second error is its failure to review deferentially the district court's exercise of discretion. The majority says the district court abused its discretion because it "made a mistake of law" in treating the lawyer's ignorance of the rule setting the time for an appeal as

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[29] *Comm. for Idaho's High Desert, Inc. v. Yost,* 92 F.3d 814, 825 (9th Cir.1996).

[30] *See Martel v. County of Los Angeles,* 56 F.3d 993, 998 (9th Cir.1995) (en banc) (Kleinfeld, J., dissenting) ("Federal Rule of Civil Procedure 1 specifically states that the rules 'shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.' Fed.R.Civ.P. 1. Sometimes serving one purpose tends to disserve another. For example, it is typical of bicycle engineering that one tries to build a lightweight, inexpensive, sturdy frame. But the better one serves any two goals, the worse one serves the third.").

[31] Fed.R.Civ.P. 1.

excusable neglect.[32] The majority thus substitutes its own judgment for that of the lower court. Avoiding the standard of review, it has mistakenly characterized the district court's permissible reading of *Pioneer* as an erroneous interpretation of the law.

The Federal Rules of Appellate Procedure assign to the district court the authority to decide in the first instance whether neglect is excusable.[33] We review for abuse of discretion district court orders granting extensions nunc pro tunc to file notices of appeal.[34] "Under the abuse of discretion standard, however, this court cannot reverse the district court's ruling unless it has a definite and firm conviction that the lower court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."[35] This standard of review is no "mere formalistic incantation."[36] In *Speiser, Krause,* we explained this standard as meaning that "within substantial margins the district court could be upheld had it determined the issue one way or the other."[37] And in that case, in which we affirmed the district court's denial of relief regarding an attorney's failure to "bother reading [Federal Rule of Civil Procedure] 81(c) carefully enough to understand it," we noted that "the district court would not necessarily have erred" had it granted relief.[38] Under *Speiser, Krause,* we cannot, as the majority does, substitute our

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[32] Maj. Op. at 17344.

[33] Fed. R.App. P. 4(a)(5)(A).

[34] *Marx v. Loral Corp.*, 87 F.3d 1049, 1054 (9th Cir.1996).

[35] *Id.*

[36] *Speiser, Krause,* 271 F.3d at 887.

[37] *Id.* at 886, 887.

[38] *Id.*

judgment for that of the district court. Nor can we avoid analyzing the equitable factors, as *Pioneer* and *Marx* require, by treating the question as one of law.

It is the *district court's* prerogative, not ours, to decide to grant or deny a motion for an expansion of time to file a notice of appeal. In this case there was no bad faith, no mischievous tactic, no prejudice to Pincay except the potential loss of the "windfall benefit" of the Andrews' missed deadline.[39] Simple ignorance of the law, even combined with negligent delegation, *may* constitute excusable neglect, and the district court did not make "a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."[40]

Good lawyers commonly give their adversaries stipulations relieving them of inadvertent errors not going to the merits. The rigid per se rule the majority creates today will make it difficult for them to do so. Our court thereby damages the mutual civility and accommodation that characterizes the practice of law at its best. This unnecessary rule will be career-destroying for decent lawyers who make inadvertent errors. We should affirm the district court's careful and fair exercise of its discretion.

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[39] *Pincay v. Andrews,* No. CV 89-1445-WMB (C.D.Cal. Sept. 3, 2002) (order granting defendants' motion for extension of time to file notice of appeal).

[40] *Marx,* 87 F.3d at 1054.

Cite as 367 F.3d 1087 (9th Cir. 2004)

Laffit PINCAY, Jr.; Christopher J. McCarron, Plaintiffs – Appellants,

v.

Vincent S. ANDREWS; Robert Andrews; Vincent Andrew Management Corp., Defendants – Appellees.

No. 02-56577.

United States Court of Appeals,
Ninth Circuit.

May 7, 2004.

Neil Papiano, Patrick McAdam, Iverson, Yoakum, Papiano & Hatch, Los Angeles, CA, for Plaintiffs – Appellants.

Andrew W. Hayes, Boies, Schiller & Flexner, Armonk, CA, for Defendants – Appellees.

ORDER

SCHROEDER, Chief Judge.

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

(2)

No. 04-875

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

LAFFIT PINCAY, JR., *et al.*,
Petitioners,

v.

VINCENT S. ANDREWS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it was not an abuse of discretion for a district court to find "excusable neglect," under Rule 4(a)(5), Fed. R. App. P., and the principles of *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), when a lawyer missed a filing deadline because of his reliance on a previously error-free calendaring system.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Vincent Andrews Management Corporation has no parent corporation, and no publicly-held company owns 10 percent or more of its stock.

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IN THE

Supreme Court of the United States

No. 04-875

LAFFIT PINCAY, JR., *et al.*,
Petitioners,

v.

VINCENT S. ANDREWS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

The issue now before the Court arises out of a district court order granting respondents an extension of time in which to file a notice of appeal. Applying the language of Rule 4(a)(5) of the Federal Rules of Appellate Procedure, and the principles set forth by this Court in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), the district court found that respondents had demonstrated "excusable neglect" for their failure to meet the original deadline. After a panel reversed that order, the Ninth Circuit, sitting en banc, vacated the judgment of the panel and affirmed the order granting the extension of time. It thus directed the panel to decide the merits of the appeal. That appeal is presently pending.

A. The Underlying Action

The facts of the underlying action may be briefly summarized. Petitioners are horse racing jockeys who were business management clients of respondent Vincent Andrews Management Corporation ("Andrews Management") and its predecessor from 1967 (in the case of petitioner Pincay) and 1979 (in the case of petitioner McCarron). *See Pincay v. Andrews*, 238 F.3d 1106, 1107 (9th Cir. 2001) (*Pincay I*). Andrews Management handled its clients' accounting and tax matters, prepared budgets, obtained insurance policies and mortgages, and developed retirement plans. Pursuant to an oral agreement, the terms of which date to 1967, Andrews Management charged its clients five percent of their professional income for those services. *Id.*

Petitioners have complained that, unbeknownst to them, they were overcharged by respondents. In essence, their claims rest on two assertions, both of which must be true for them to prevail. First, they allege that their five percent oral contract with Andrews Management precluded respondents Vincent and Robert Andrews (or any entity in which they had an interest, including respondent Andrews Management) from having an interest in, or receiving any compensation from, partnerships in which petitioners chose to invest. Second, they charge that respondents received, and concealed their receipt of, such challenged compensation. *Id.* at 1108-09. Petitioners brought suit under both state law and the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et. seq.*

Both the state law and federal RICO claims were tried to a jury, which found for petitioners. *See Pincay I*, 238 F.3d at 1108. After directing petitioners to elect between their RICO remedies and punitive damages awards under state law, the

district court then entered judgment on the RICO claims.[1] On appeal, the Ninth Circuit reversed. *See id.* at 1110. Pointing out that petitioners had received clear written disclosures of respondents' interests in the partnerships at least as early as 1980, the court held that their RICO claims were untimely as a matter of law. *See id.* at 1108-10. The court also held that petitioners' claims were not tolled by the doctrine of fraudulent concealment, stating that the doctrine only operates before a plaintiff obtains actual notice of the facts underlying the particular claim. *See id.* at 1110.

Petitioners then moved in the district court for new judgments based on their state law claims, which had relied on identical facts and the same theory of concealment and tolling as their RICO claims. Respondents opposed the motion on several grounds, including the ground that the terms of the prior judgments barred petitioners from seeking entry of new judgments, and conditionally cross-moved for remittitur. The district court granted petitioners' motion and denied respondents' cross-motion. It thus entered new judgments in petitioners' favor on all of their state law claims.

B. Respondents' Motion for An Extension of Time

1. This procedural history provides the background for the matter now before the Court. Because the district court order entering judgments for petitioners was entered on the docket on July 3, 2002, Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure required respondents to file their notice of appeal on or before August 2, 2002 (30 days after the docketing). However, respondents' counsel, relying on the

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[1] While post-trial motions were still pending, respondents had filed for bankruptcy, staying further decision. Subsequently, the bankruptcy court lifted the automatic stay in order to permit resolution of post-trial motions and appeals. Petitioners' initial judgments, which related solely to their federal RICO claims, were vacated in part and then reinstated by the district court, which entered new final judgments again covering only the RICO claims.

calendaring system at his firm (discussed below), mistakenly believed that the notice was due 60 days after docketing. *See* Appellants' C.A. 9 Excerpts of Record ("ER") 072-73; Supplemental Excerpts of Record ("SER") 003-04 at ¶¶ 9-12. Respondents' counsel discovered the error only after the 30 days had passed, when petitioners filed a notice in the bankruptcy proceedings stating that the deadline had been missed. ER 073 at ¶ 11.

Respondents promptly moved, pursuant to Rule 4(a)(5) of the Appellate Rules, for an extension of time in which to file the notice. That rule, quoted in part at page two of the Petition, allows for extensions on a motion filed "no later than 30 days after the time prescribed by this Rule 4(a) expires," provided that the movant makes a showing of either "good cause" or "excusable neglect." Rule 4(a)(5)(A)(i) & (ii). Respondents argued that their documented reliance on a previously dependable calendaring system was sufficient to establish "excusable neglect." To put that argument in perspective, we set forth how that calendaring system worked and what efforts were made to comply with the filing deadline in this case.

2. The law firm representing respondents in this case calendars cases and sets filing deadlines through a system in which experienced clerks (also referred to as case managers) receive copies of all papers in a case and docket those papers. The case managers then calculate any applicable due dates, making corresponding entries on a court calendar that they maintain on the firm's computer network. Having done so, the case managers notify the attorneys working on the matter of the papers that they have received and of the due dates that they have calculated. ER 071 at ¶¶ 3-4; SER 002-03 at ¶¶ 5-6. If the case managers have questions about the applicable dates, or about interpretation of the rules, they raise those questions directly with the supervising attorney. Although the firm's attorneys may calculate the due dates for them-

selves, they commonly rely on this calendaring system to determine the relevant filing dates, and regularly review the calendar with the case managers, who understand that the calendar must be accurately maintained. ER 071 at ¶¶ 3-4; SER 002-03 at ¶ 6.

The case managers are selected and trained to perform this particular job. For example, the case manager responsible for calendaring the appeal in this case had previously worked for several years as a clerk handling case management and calendaring in another firm with an active litigation docket. Prior to that, he had worked as a clerk and a courtroom deputy in the United States District Court for the Southern District of New York, earning a Second Circuit award for his diligent service. SER 002 at ¶ 2; ER 071-72 at ¶ 5. Until the missed deadline here, the case manager had never failed to properly calculate and calendar a deadline. ER 072 at ¶ 6; SER 002-03 at ¶ 6.

3. In this case, the responsible case manager received copies of the July 3, 2002, district court judgments on July 10th. He immediately reported that fact to the attorney in charge, who was working at the offices of a client. The attorney responded later that day, asking the case manager about the judgments, and specifically asking about the deadline to notice appeal of those judgments. ER 072 at ¶ 7; SER 003 at ¶¶ 9-10.

The case manager was out of the office on July 11th, but promptly replied by e-mail on July 12th, indicating (mistakenly) that "[a]ccording to FRAP rule 4, we get 60 days from the date of entry of judgment, which was 7/3/02." SER 007.[2]

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[2] Rule 4 does provide 60 days to file a notice of appeal but only "[w]hen the United States or its officer or agency is party . . . ." Rule 4(a)(1)(B), Fed. R. App. P. The case manager acknowledges that he "knew at the time that the United States was not a party to the action." SER 004 at ¶ 13.

The case manager noted that the sixtieth day was September 1st, which was a Sunday, making the due date Monday, September 2nd. *Id.* He quickly followed up with another e-mail pointing out that, since September 2nd was Labor Day, the last day to file would actually be September 3rd. ER 072-73 at ¶ 8; SER 003-04 at ¶¶ 10-11.

The attorney then instructed the case manager to calendar the notice of appeal for the week before it was thought to be due. Specifically, the attorney said that, "[t]o be safe, let's calendar it for the Thursday before Labor Day" (*i.e.*, August 29th). ER 073 at ¶ 8; SER 004 at ¶ 12. The case manager confirmed that he had done so. The accelerated deadline was entered as the due date on the calendar that the case manager maintained. ER 073 at ¶ 10; SER 004 at ¶ 12, 009.

On Thursday, August 22nd (20 days after the notice of appeal should have been filed), the attorney received a notice submitted by petitioners in the bankruptcy court, asserting that respondents had not appealed the district court judgments by the applicable deadline. Realizing that a mistake had been made, the attorney immediately informed petitioners' counsel of his intention to file an expedited motion, pursuant to Rule 4(a)(5), to extend the time to notice the appeal. Respondents' attorney also offered to shorten the appellate briefing schedule (solely out of respondents' time) to compensate for the late notice. ER 073-74 at ¶¶ 11-12. Petitioners' counsel responded that petitioners would not agree to the relief sought. ER 075 at ¶ 16. Respondents filed their motion four days later, within the time permitted by Rule 4(a)(5).

The district court granted respondents' motion, declaring that the Notice of Appeal enclosed with the motion would be deemed timely filed as of August 27, 2002. Pet. App. 27. Applying the multi-factor test established in *Pioneer*, *see* 507 U.S. at 395, the district court found that the calendaring mistake was the result of "excusable neglect." *See* Pet. App. 23-28. Petitioners filed a timely notice of appeal from that order.

C. The Ninth Circuit Decision

The separate appeals by respondents (of the merits judgments) and by petitioners (of the order granting an extension of time), though apparently not formally consolidated by the Ninth Circuit, were argued together before the same court of appeals panel. The panel did not reach the merits, holding instead that the decision to grant the extension was a "mistake of law." Pet. App. 30. Noting the statement by this Court that "'inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect,'" Pet. App. 33 (quoting *Pioneer*, 507 U.S. at 388), the panel observed: "Here there was ignorance of the rules, compounded by delegation of knowledge of the rules to a nonlawyer for whom responsibility was not accepted." Pet. App. 37.

The Ninth Circuit then ordered the case to be reheard en banc. Pet. App. 47. In its en banc opinion, the court of appeals first considered whether it was appropriate to create a "per se rule against delegation to paralegals," Pet. App. 4, concluding that it was not. The court noted that, "[i]n the modern world of legal practice, the delegation of repetitive legal tasks to paralegals has become a necessary fixture," Pet. App. 5, and that delegation to specialized non-lawyers "may well ensure greater accuracy in meeting deadlines . . . ." Pet. App. 5. While the court emphasized that "[t]he responsibility for the error falls on the attorney regardless of whether the error was made by an attorney or a paralegal," Pet. App. 5, it nevertheless held that "delegation of the task of ascertaining the deadline was not per se inexcusable neglect." Pet. App. 6.

The court of appeals then turned to the question whether "the misreading of the clear rule could appropriately have been considered excusable." Pet. App. 6. The court surveyed the views of other Circuits on similar questions, finding more "confusion" than consensus. Pet. App. 10. However, it did find agreement on the general principle that appellate courts

should review findings regarding "excusable neglect" pursuant to an abuse of discretion standard. Pet. App. 10. Under that standard, the court said, it could not reverse the district court finding "unless [it was] left with the definite and firm conviction that the lower court committed a clear error of judgment in the conclusion it reached after weighing the relevant factors." Pet. App. 11.

The court found no such clear error of judgment here. At the same time, it made quite plain that it was basing its decision on the breadth of discretion properly accorded to the district court, not on its own independent assessment of the circumstances. Stating that "the lawyer undoubtedly should have checked the Rule itself before relying on the paralegal's reading," Pet. App. 11, the court observed: "a lawyer's failure to read an applicable rule is one of the least compelling excuses that can be offered . . . ." Pet. App. 11. Indeed, the court pointedly indicated that "[h]ad the district court declined to permit the filing of the notice, we would be hard pressed to find any rationale requiring us to reverse." Pet. App. 12. In the end, however, the court declined to adopt any per se rule, Pet. App. 13-14, choosing to "leave the weighing of *Pioneer's* equitable factors to the discretion of the district court in every case." Pet. App. 14. It thus affirmed the granting of the extension of time, and directed the panel to consider the merits of respondents' appeal. Pet. App. 14.

Judge Kozinski, joined by two other judges, dissented. Acknowledging that most of the *Pioneer* factors tilted in favor of allowing the extension, Judge Kozinski stated that "defendants need not have offered a terribly good countervailing reason to make their neglect excusable." Pet. App. 17. But he saw no adequate reason here. Rejecting the explanation that the lawyer had relied on a previously faultless calendaring system, Judge Kozinski declared that "[e]rrors made by clerks performing lawyerly functions are probably less excusable than those made by the lawyer him-

self; they certainly can't be more so." Pet. App. 19. He thus concluded that "the error here—whether made by the lawyer, the calendaring clerk or the candlestick-maker—is inexcusable . . . ." Pet. App. 22.

ARGUMENT

This case does not merit further review. Although petitioners contend that the federal courts are in conflict with respect to administration of the Rule 4(a)(5) "excusable neglect" standard, that claim is incorrect as applied to the specific question presented by this case: whether it is an abuse of discretion (or error of law) for a district court to find "excusable neglect" based upon a lawyer's reliance on a trained and previously error-free calendaring clerk. There is no conflict on that question. Only one other Circuit has even considered the application of Rule 4(a)(5) in comparable circumstances, *see United States v. Hooper*, 43 F.3d 26 (2d Cir. 1994) (per curiam), and that court held only that a district court *could* properly find the failure to file a timely notice inexcusable, not (as petitioners contend here) that it *must*. In this case, the Ninth Circuit strongly suggested (in conformity with *Hooper*) that it, too, would have affirmed a decision of the district court holding that the neglect should not be excused. Pet. App. 12.

Although petitioners rely on statements by various Circuits that a lawyer's misreading of a clear rule can never constitute "excusable neglect," *see, e.g., United States v. Torres*, 372 F.3d 1159, 1163 (10th Cir. 2004); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000); *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 133 (7th Cir. 1996), the rationale of those cases cannot automatically be imported to the circumstances here. With respect to "misreading" claims, several courts of appeals have indicated a concern that a flexible case-by-case approach to such explanations would allow lawyers who disregard or forget a deadline simply to assert after the fact that they misread the rule instead. *See, e.g., Advanced Estimating System, Inc. v. Riney*, 130 F.3d

996, 998 (11th Cir. 1997); *Lowry*, 211 F.3d at 464. Whatever the merits of that concern, it is simply inapplicable where, as here, the lawyer actively sought to ascertain and comply with the applicable deadline, relying on a calendaring system that had proved fully reliable in the past. The verifiable evidence of that effort—in contemporaneous e-mails and calendar entries—serves to distinguish the neglect in this case, unfortunate as it was, from neglect resulting from sheer indifference to a deadline or plain forgetfulness.

In any event, there is no evident need for further categorical refinement of the "excusable neglect" standard. Even the different formulations among the Circuits seem more matters of language and tone than of concrete results, for some Circuits with stricter formulations have been flexible in application. *See, e.g., United States v. Brown*, 133 F.3d 993 (7th Cir. 1998). This Court has already made clear that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect . . . ," *Pioneer*, 507 U.S. at 392, and all Circuits, including the Ninth Circuit, recognize that a finding of "excusable neglect" for such negligence must be the exception, not the rule. *See* Pet. App. 11 ("[w]e recognize that a lawyer's failure to read an applicable rule is one of the least compelling excuses that can be offered"). Given the strictness of the standard in the first place, it is likely to be the rare case in which the various courts of appeals, however they characterize their rules, would actually reach different outcomes on essentially similar facts. Additional codification of rules for subcategories of carelessness would be a complicated, even impracticable, response to a largely non-existent problem.

Finally, we note the unusual procedural posture of this case. Because the merits appeal and the timeliness appeal have gone forth as separate appeals—with one receiving en banc consideration—the timeliness appeal is now before this Court while the merits appeal is before a panel of the Ninth Circuit. A decision on the latter (if in favor of petitioners)

would almost certainly moot the former, at least absent further consideration by the Ninth Circuit or this Court. Review at this point thus would seem premature.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS RFQUIRING REVIEW

To assess whether there is a conflict among the Circuits on the issue decided by the Ninth Circuit, it is necessary first to define just what that issue was. Given the relevant circumstances and the posture of the case on appeal, the Ninth Circuit had to decide whether the district court—applying the *Pioneer* factors, *see* 507 U.S. at 395[3]—abused its discretion by finding "excusable neglect" when a lawyer relied on a previously dependable calendaring clerk to determine the correct filing date for a notice of appeal. The Ninth Circuit held that it had not. At the same time, however, the court of appeals emphasized that it was basing its decision on the highly deferential nature of its abuse-of-discretion review, stating: "[h]ad the district court declined to permit the filing of the notice, we would be hard pressed to find any rationale requiring us to reverse." Pet. App. 12.

Thus understood, the decision below is not in conflict with any decision in any other Circuit. No Circuit has held that a finding of "excusable neglect" is per se impermissible when a lawyer has made documented efforts to comply with the correct filing date but has failed, at least in part, due to the

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[3] The Court in *Pioneer* indicated that, in assessing whether particular neglect is excusable, the federal courts should consider all relevant circumstances, including "the danger of prejudice to [to the opposite party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *See Pioneer*, 507 U.S. at 395. Although *Pioneer* involved a provision of the Bankruptcy Rules, the *Pioneer* factors have regularly been applied to the "excusable neglect" standard of Rule 4(a)(5). *See Stutson v. United States*, 516 U.S. 193, 195 (1996) (citing courts of appeals cases).

unprecedented error of a calendaring clerk. (Only one other Circuit has addressed that situation. *See* pages 14-15 *infra*). Thus, while petitioners emphasize that certain courts of appeals have sought to rein in findings of "excusable neglect" under Rule 4(a)(5), those courts have typically been dealing with a different kind of situation: where the attorney in question simply let the deadline pass or claimed without contemporaneous documentation to have misread the applicable rule. It is in that particular context that various Circuits have said that the disregard or misreading of a clear rule "cannot," or can "never," amount to "excusable neglect." *See, e.g., Torres*, 372 F.3d at 1163; *Prizevoits*, 76 F.3d at 133; *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994).

Despite broad language in those cases, their underlying rationale does not readily carry over to the circumstances here. As the Eleventh Circuit has indicated, federal courts may need to treat the misreading of a clear rule exactly as they treat ordinary forgetfulness or utter indifference to the rules, given the likelihood that any lawyer guilty of the latter will afterwards claim the former if the standards diverge. *See Advanced Estimating System*, 130 F.3d at 998. The Eleventh Circuit explained: "[A] lawyer's misunderstanding of clear law *cannot* constitute excusable neglect. If it could, almost every appellant's lawyer would plead his own inability to understand the law when he fails to comply with a deadline." *Id.* (emphasis added). The Fifth, Sixth, and Eighth Circuits have made a similar point, quoting the Eleventh Circuit. *See Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877, 879 (5th Cir. 1998); *FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678, 687 (6th Cir. 1999); *Lowry*, 211 F.3d at 464.

This concern about unverifiable excuses is not merely theoretical. In practice, several courts of appeals have been openly skeptical about unsubstantiated claims that a lawyer was unaware of, or simply misunderstood, a clear rule. *See*

Lowry, 211 F.3d at 463-64; *Prizevoits*, 76 F.3d at 133. In *Lowry*, for example, the Eighth Circuit found no basis for "excusable neglect" in a lawyer's representations that he had miscalculated a deadline because of "the weekend time and the calculations thereto" (211 F.3d at 463) and because of "the number of days in the month of June" (*id.* at 464), pointing out that "the rules clearly provide that intermediate weekends are to be counted in the thirty-day computation" and that "[i]f June had thirty one days instead of thirty, the notice of appeal would have been due one day *sooner*." *Id.* at 463-64 (emphasis added). Bluntly dismissing these explanations, the Court declared that "what we have, then, is garden-variety attorney inattention." *Id.* at 464. Similarly, in *Prizevoits*, the Seventh Circuit found implausible the claimed belief of an experienced lawyer that he had tolled the appeal period by seeking additional time for a Rule 59(c) motion, *see* Rule 59(c), Fed. R. Civ. P., given the explicit language of Rule 6(b) that the time for Rule 59(c) motions cannot be extended. *See* 76 F.3d at 133. The Seventh Circuit stated flatly: "[The lawyer] must know about Rule 6(b). An unaccountable lapse is not excusable neglect." *Id.*; *see also id.* ("excuses [are] so thin as to leave the lapse not only unexcused, but inexplicable.") And, while judges may be reluctant to accuse particular lawyers of fabricating excuses, it is natural to expect that they will wonder just how an attorney can, in fact, "misread" a truly clear and unambiguous rule. *See generally Consolidated Freightways Corp. of Delaware v. Larson*, 827 F.2d 916, 919 (3d Cir. 1987) (court must consider, *inter alia*, "whether the asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court"); *United States v. Guy*, 140 F.3d 735, 736 (7th Cir. 1998) (error by experienced lawyer was "inexplicable").

The circumstances here, however, are different. Although the lawyer missed an easily-identifed deadline, there is no possibility that he did so as a result of forgetfulness or utter indifference. Rather, as the relevant e-mail correspondence

showed, both the lawyer and the calendaring clerk engaged in a genuine effort to make a timely (indeed, even an early) filing. Unlike the purported "misreading" cases, therefore, the district court had before it concrete verifiable evidence that the lawyer—though making an error of judgment—did not "freely ignor[e]" the deadline, *see Pioneer*, 507 U.S. at 395, or neglect the matter entirely. Depending upon how the other *Pioneer* factors are weighed, that proof of effort may be enough to turn an otherwise inexcusable failure to comply with Rule 4(a)(1) into an excusable one. *See* Pet. App. 14-16 (Berzon, J., concurring).[4]

The Second Circuit is the only federal court of appeals to address application of Rule 4 under similar circumstances—in *United States v. Hooper*, 43 F.3d 26 (2d Cir. 1994) (per curiam), a case cited only in passing by petitioners (*see* Pet. 7)—but there it merely upheld a lower-court finding that the neglect was not excusable. In *Hooper*, the defendant had failed to file a timely notice of appeal under Rule 4(b) of the Appellate Rules because his lawyer entrusted the job to a legal assistant who incorrectly thought that she had 30 days (not ten) to file the notice. Those facts are, in many respects, close to those here. But, procedurally, *Hooper* is the mirror image of this case: there, under the comparable provision for criminal appeals, the district court had found that the neglect was *not* excusable, and the Second Circuit simply concluded that this finding was not an abuse of discretion. *See Hooper*, 43 F.3d at 29. That decision cannot fairly be said to conflict with the decision below, where the Ninth Circuit was reviewing the

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[4] In her opinion, Judge Berzon specifically contrasted the "misfiring of a generally well-conceived calendaring system" (Pet. App. 15) with plain disregard of court orders and deadlines (*id.*). Although she was critical of the lawyer's effort in this case, calling it "an exceedingly poor one," *id.*, she recognized that the lawyer did, in fact, make an effort, rather than just letting the deadline pass unnoticed, and that the effort was relevant to the reason-for-the-delay inquiry under *Pioneer*, not just the good faith inquiry. *Id.*

opposite finding (that the neglect *was* excusable) and strongly indicated that it would equally have upheld a finding that it was not. *See* Pet. App. 12.

There is thus no direct conflict between the decision below and the decision of any other federal court of appeals. Nonetheless, we recognize that, at a more general level, there are differing views about whether federal courts should designate certain kinds of neglect as per se inexcusable. As we discuss in the next section, we do not believe that this Court needs to grant certiorari in order to address those views.

II. THERE IS NO NEED TO AMEND THE PIONEER STANDARD

The decision of this Court in *Pioneer* made several critical points about the concept of "excusable neglect." Most broadly, it rejected the notion that "excusable neglect" requires a showing of circumstances beyond the movant's control, holding instead that "the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." 507 U.S. at 395. *See also* note 3 *supra* (identifying *Pioneer* factors). More narrowly, the Court gave explicit direction to the lower courts regarding exercise of that equitable discretion, advising that "inadvertence, ignorance of the rules, or mistakes construing the rules *do not usually constitute 'excusable' neglect.*" 507 U.S. at 392 (emphasis added). That observation established the basic principle that lower courts should typically deny relief for missing deadlines, if the movants show nothing more than such routine hard-to-justify errors. *See, e.g., Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465, 469 (5th Cir. 1998) (noting that, under *Pioneer*, misconstruction of rules will "rarely" satisfy standard).

Petitioners acknowledge the importance of the *Pioneer* admonition, quoting it at the outset of their "Reasons for Granting the Petition" section. *See* Pet. 6. Nevertheless, they

urge this Court to go even further and to refine when, and under what circumstances, the failure to comply with a clear federal rule may be considered "excusable neglect." Pet. 10-13. Even though some Circuits have attempted this undertaking, at least in part, *see* pages 12-13 *supra*, we do not think it necessary for this Court to do so. There are several reasons for this view.

To begin with, the "do-not-usually-constitute-excusable-neglect" instruction in *Pioneer* already results in substantial conformity among federal courts with regard to findings of "excusable neglect." All federal courts of appeals, including the Ninth Circuit, acknowledge and accept the prevailing rule that requests for extensions of time based on lawyer misfeasance should "usually" be denied, relying on the language of *Pioneer* for that understanding. *See, e.g.*, Pet. App. 7; *Speiser, Krause & Madole P.C. v. Ortiz*, 271 F.3d 884, 886 (9th Cir. 2001); *Torres*, 372 F.3d at 1163; *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 368 (2d Cir. 2003); *Mirpuri v. ACT Mfg, Inc.*, 212 F.3d 624, 631 (1st Cir. 2000); *Thompson v. E.I. DuPont de Nemours & Co., Inc.*, 76 F.3d 530, 533 (4th Cir. 1996). That common approach leaves only a small minority of cases in which federal courts are apt to find "excusable neglect" in the first place. And it is by no means self-evident that Circuits with facially less flexible standards would actually decide those cases any differently. *See* pages 17-18 *infra*.

It is also not clear that more categorical rules would ultimately produce much more uniformity. As this Court observed in *Pioneer*, "narrowing the range of factors to be considered in making the 'excusable neglect' determination will not eliminate disputes about how the remaining factors should be applied in any given case." 507 U.S. at 395 n.14.[5]

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[5] This Court has noted that some terms are largely incapable of precise definition. *See, e.g., Maryland v. Pringle*, 540 U.S. 31, 42 (2003) ("probable cause"); *United States v. Sokolow*, 490 U.S. 1, 7 (1989) ("reasonable

Thus, for example, a blanket rule barring extensions based upon a "lawyer's misreading of clear law" not only would raise questions about whether it encompasses instances of delegation to a trained assistant, as in this case, but would also invite possible disagreements about whether it should apply to errors of fact as well as law. *See, e.g., Advanced Estimating System*, 130 F.3d at 999 (suggesting such a distinction); *Silivanch*, 333 F.3d at 369 (rejecting such a distinction); Pet. App. 13 (same). And, even apart from considerations like extenuating outside circumstances, there cannot help but be conflicting views about the core question of whether particular laws are truly clear, especially if calculation of a deadline requires review of several interrelated statutory provisions. *See, e.g., Weinstock*, 16 F.3d at 503 (characterizing a former rule as a "trap for the unwary.")

What is probable, then, is that federal courts will apply even categorical rules with an eye towards the particular circumstances of a given case. For example, both the Seventh and Eleventh Circuits, despite seemingly hard and fast rules, *see* pages 12-13 *supra*, have found "excusable neglect" even when lawyers missed a deadline set by an undeniably clear provision. In *United States v. Brown*, the Seventh Circuit, ruling just two years after its decision in *Prizevoits*, affirmed a finding of "excusable neglect" on the ground that the negligent attorney (unlike the *Prizevoits* attorney) was relatively inexperienced in federal court matters. *See* 133 F.3d at 997 ("[b]ecause of his inexperience Brown's attorney admits he did not know the rule.") And, in *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996), the Eleventh Circuit found "excusable neglect" when a lawyer missed an easily-identified deadline because a secretary had failed to

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suspicion"). *See also Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("Constitution does not require that any particular form of words be used" to express concept of reasonable doubt).

advise him that he (rather than another attorney) needed to file the required papers. *See id.* at 849-50. *See also Advanced Estimating System*, 130 F.3d at 998-99 (discussing *Cheney*); *Walter v. Blue Cross & Blue Shield of Wisconsin*, 181 F.3d 1198, 1202 (11th Cir. 1999) (finding "excusable neglect" when secretary forgot to calendar response to motion).

We question, therefore, whether a more rigid set of "excusable neglect" rules would add much of value to the standards set forth in *Pioneer*. This Court has already established that the proper test for determining "excusable neglect" is to be strict, though not absolute. Under that directive, a federal court, "taking account of all relevant circumstances," 507 U.S. at 395, may sometimes (though not usually) find a lawyer's carelessness to be excusable. *See generally Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("[e]quity eschews mechanical rules . . . [and] depends on flexibility.") That is all that happened here. The Ninth Circuit, applying the *Pioneer* standards, expressed disapproval of the lawyer's reliance on his firm's calendaring system but declined to find such reliance to be so out of order that it must be deemed inexcusable as a matter of law.

Finally, we question whether it is necessary to insist upon stricter "excusable neglect" standards when, under the federal rule in question, the neglect is likely to cause little or no prejudice. That is the case under Rule 4(a)(5). While compliance with Rule 4 filing requirements is central to proper appeals, the fact is that Rule 4(a)(5) steers a middle course between flatly prohibiting post-deadline extensions and allowing them for an indefinite period of time, mandating that any motion be filed no more than 30 days after the original deadline and strictly limiting the length of the extension. *See* Rule 4(a)(5)(A)(i) & (C). Those explicit restrictions assure that prejudice to an opposing party will be minimal, and federal courts have frequently pointed out, when applying

the *Pioneer* factors under Rule 4(a)(5), that it will be the rare case in which any genuine prejudice has resulted. *See, e.g., Lowry*, 211 F.3d at 463; *Prizevoits*, 76 F.3d at 134. Indeed, the Second Circuit has held that it is permissible to grant an extension of time under Rule 4(a)(5), even without a strong showing of "excusable neglect," when the opposing party does not raise an objection to the extension. *See Williams v. KFC National Management Co.*, 391 F.3d 411 (2d Cir. 2004); *see also Kontrick v. Ryan*, 540 U.S. 443 (2004). Although the absence of prejudice does not mean that Rule 4(a)(5) extensions ought to be available just for the asking—a practice that *Pioneer* would bar in any event—it does suggest that there is no pressing need to revisit the definition of "excusable neglect" in this context.

The dissent below, while not disputing this general lack of prejudice, *see* Pet. App. 17 ("prejudice is typically minimal"), nonetheless urged a tougher "excusable neglect" standard for a practical reason: it would encourage lawyers to pay greater attention to the rules. Pet. App. 19-20; *see also* Pet. 10-11. Certainly, no one disputes that the lawyer here could have avoided the calendaring mistake by giving greater care to the matter himself, instead of relying so much on the case manager. But that fact can hardly make the error inexcusable in and of itself, since even meritorious claims of "excusable neglect" will involve circumstances in which a lawyer could have, and presumably should have, done more. As this Court pointed out in *Pioneer*, the phrase "excusable neglect," by its very terms, presupposes that there has been neglect (*i.e.* "carelessness"). *See* 507 U.S. at 388. The question, then, inevitably comes back to *why* the lawyer has been careless ("the reason for the delay"), and the facts underlying that inquiry will vary from case to case. While there is never a very good reason for carelessness, it seems at least within the bounds of "excusable neglect" that a lawyer placed too much reliance

on someone who was trained to do the particular task and who had done it without mishap on every previous occasion.[6]

That possibility will not, as the dissent below supposed, encourage more lax behavior by lawyers and their assistants. To state the obvious, few lawyers would ever consciously risk the professional misery that comes from failing to meet a critical filing deadline, with all the attendant costs to the client whose claims may thereby be dismissed. Furthermore, the decision below could give only the coldest comfort to any lawyer wanting to assess whether negligence might be excused. A straightforward reading of that decision makes it quite apparent that district court judges are free to treat the missing of clear deadlines as inexcusable, without being subject to reversal for abusing their discretion. *See* Pet. App. 12. In short, the Ninth Circuit has done little to invite lawyers to be careless about filing dates.

III. THE ISSUES IN THIS CASE MAY SOON BECOME MOOT

The case comes before this Court in an unusual position. After respondents had appealed the adverse decision on the merits—relying on the extension of time granted by the district court—petitioners appealed the order granting that extension. The appeals carried different case numbers in the court of appeals and apparently were not formally consolidated. Nonetheless, pursuant to a court of appeals order, the appeals were argued at the same time before the same panel. Because the panel held that the extension of time was invalid, it had no cause to reach the merits of the case.

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[6] The Ninth Circuit did not suggest that reliance on a co-worker would always be a possible basis for "excusable neglect." For example, it is highly doubtful that a lawyer could rely on delegation when the tasks assigned were plainly beyond the competence of the assistant. In this case, however, no one questions that a trained and experienced calendaring clerk, like the one here, is fully capable of reading Rule 4(a)(1)(A) to set a filing date of 30 days after entry of judgment.

The en banc court then vacated the panel's judgment and affirmed the order granting the extension, effectively reinstating the appeal of the merits. With respect to that appeal, it said: "The merits of the appeal are before the three judge panel in appeal number 02-56491. The panel should proceed to decide that appeal." Pet. App. 14. That is where matters now stand. Having been fully briefed and argued, the merits appeal is under consideration by the original panel.

This sequence of events raises an obvious possibility that a decision below will render moot, or at least make irrelevant, the issue raised in the present petition. If petitioners were to prevail on their arguments that the judgments should stand, and if no further review were sought or obtained, it would seem to make no practical difference whether respondents had filed a timely appeal or not. Although the disposition by the court of appeals might differ in form—between a dismissal and an affirmance—that difference would not appear to have any real effect on the parties themselves. In either case, petitioners would be entitled to their judgments.[7]

The petition thus may be regarded as premature. In our view, however, the previously stated reasons for denial would apply equally to a petition filed after disposition of the merits. We request, therefore, that the petition be denied.

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[7] The jurisdictional issue is not moot, of course, if respondents prevail on the merits. Their ability to do so depends upon the validity of their notice of appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

LAFFIT PINCAY, JR. and
CHRISTOPHER J. McCARRON,

Petitioners,

v.

VINCENT S. ANDREWS, ROBERT ANDREWS, and
VINCENT ANDREWS MANAGEMENT CORP.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners Laffit Pincay, Jr. and Christopher J. McCarron reply as follows to the respondents' brief in opposition ("Brief in Opp."):

I.

This Is a Timely and Jurisdictionally Significant Case

Respondents argue that this case is premature. (Brief in Opp. 11, 20-21.) Their argument is without merit. Petitioners are seeking certiorari review after the Ninth Circuit entered a judgment against petitioners in their appeal from the District Court's post-judgment order that extended the time for the respondents to file a notice of appeal. Appendix to Petition for a Writ of Certiorari ("Pet. App.") 4. This case, therefore, is an "after-judgment" case under 28 U.S.C. § 1254(1). *See, e.g., S.E.C. v. Suter,* 832 F.2d 988, 990 (7th Cir. 1987) (after district court enters final judgment, if post-judgment proceedings follow in the district court, those proceedings are, for purposes of appeal, a separate lawsuit, and the final orders that the district court enters are appealable). Thus, petitioners' appeal complied with usual appellate practice. *See Midwest Employers Cas. Co. v. Williams,* 161 F.3d 877, 879 (5th Cir. 1998); *Advanced Estimating System, Inc. v. Riney,* 130 F.3d 996, 997 (11th Cir. 1997); *Marx v. Loral Corp.*, 87 F.3d 1049, 1053 (9th Cir. 1996).

The Ninth Circuit's decision below conflicts with six other Circuits over the question of whether an experienced federal practitioner's negligent misunderstanding of a clear procedural rule cannot constitute "excusable neglect" under Rule 4(a)(5) of the Federal Rules of Appellate

Procedure ("Rule 4").[1] As *Browder v. Director, Department of Corrections Illinois,* 434 U.S. 257 (1978), explains "a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken. This 30-day time limit is 'mandatory and jurisdictional.'" *Id.* at 264 (citations omitted). Thus, even the respondents concede (Brief in Opp. 21, n. 7) that without "excusable neglect" the appeal filed by respondents is untimely and, therefore, the Ninth Circuit must dismiss the appeal for lack of jurisdiction. *See, e.g., Lowry,* 211 F.3d at 464; *Advanced Estimating System,* 130 F.3d at 999. In other words, the underlying issues of that appeal provide no basis for determining "excusable neglect" under Rule 4. *Lowry,* 211 F.3d at 464; *Advanced Estimating System,* 130 F.3d at 199; *cf. Ari v. American Bryce Ranches, Inc.* 316 F.3d 1066, 1071 (9th Cir. 2003) (district courts cannot consider underlying issues of parties' claims when presented with Fed. R. App. Proc. Rule 4(a)(6) motion).

II.

The Conflict Requires This Court's Immediate Resolution

The conflict that the Ninth Circuit has intentionally created (Pet. App. 13) arises from the Ninth Circuit's confusion about *Pioneer Investment v. Brunswick,* 507 U.S.

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[1] *Compare* Pet. App. 13 *with U.S. v. Torres,* 372 F.3d 1159, 1163 (10th Cir. 2004); *Silivanch v. Celebrity Cruises,* 333 F.3d 355, 369-70 (2d Cir. 2003), *cert. denied, sub nom. Essef v. Silivanch,* 124 S.Ct. 1047 (2004); *Lowry v. McDonnell Douglas Corp.,* 211 F.3d 457, 464 (8th Cir. 2000), *cert. denied,* 531 U.S. 929 (2000); *Midwest Employers Cas. Co.,* 161 F.3d at 879-80; *Advanced Estimating System,* 130 F.3d at 998; *Prizevoits v. Indiana Bell Telephone Co.,* 76 F.3d 132, 134 (7th Cir. 1996).

380 (1993). Pet. App. 7 ("Our circuit's confusion . . . begins with *Pioneer* itself."). Accordingly, more litigation in the lower courts will not lead to further clarity or shed further light on how this Court should analyze the conflict. Indeed, the Ninth Circuit's divided opinion is a catalogue of the conflict. Pet. App. 4-23.

Respondents argue "there is no direct conflict between the decision below and the decision of any other federal court of appeals." Brief in Opp. 15. Yet respondents' very experienced federal practitioner was, in essence, personally ignorant of or mistaken about a clear and customary procedural rule. *E.g.*, Plaintiffs-Appellants' Excerpts of Record ("ER") at 071-073. So were the federal practitioners in *U.S. v. Torres*, 372 F.3d at 1163; *Silivanch*, 333 F.3d at 369-70; *Lowry*, 211 F.3d at 464; *Midwest Employers Cas. Co.*, 161 F.3d at 879-80; *Advanced Estimating System*, 130 F.3d at 998; *Prizevoits*, 76 F.3d at 134. These Circuits held the excuse was insufficient to allow late filings under Rule 4. The same should be true in the Ninth Circuit.

Respondents fail to cite any Rule 4 case in which a federal court was as lenient toward an experienced federal practitioner as the District Court was in this case. Brief in Opp. 11-15. Thus, respondents implicitly concede that "[n]o circuit has taken a position as charitable to lawyer errors as the [Ninth Circuit does] today." Quoting Pet. App. 21, Kozinski, J. (dissenting).

Respondents argue that "it seems within the bounds of 'excusable neglect' that a lawyer placed too much reliance on someone who was trained to do the particular task and who had done it without mishap on every previous occasion." Brief in Opp. 19-20. The Second and Sixth Circuits have rejected arguments similar to respondents'.

In *Silivanch v. Celebrity Cruises*, the Second Circuit found no justification for treating the attorney differently from the attorney in *U.S. v. Hooper*, 43 F.3d 26, 28-29 (2d Cir. 1994) (per curiam). *Silivanch*, 333 F.3d at 369.

In *Hooper*, the attorney's legal assistant mistakenly thought that the rule called for a 30-day rather than a 10-day limitation, whereas in *Silivanch*, the attorney knew the 30-day limitation, but neglected to consult the calendar to decide when it expired. *Silivanch*, 333 F.3d at 367, 369.

Here, the respondents' experienced federal practitioner's excuse is that he relied on his calendar clerk. ER 071-073. Respondents give no justification, and none exists, for the Ninth Circuit and the District Court treating an experienced federal practitioner differently from the federal practitioner in *Hooper*. *See FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678, 686 (6th Cir. 1999) (citing and quoting with approval *Peake v. First Nat'l Bank & Trust*, 101 F.R.D. 544, 545-46 (W.D. Mich. 1984) (attorney's conscious reliance on associate's incorrect research is not "excusable neglect.")).

The District Court, to be sure, relied on the Ninth Circuit's decision in *Marx v. Loral Corp.*, 87 F.3d 1049 (9th Cir. 1996). Pet. App. 26-27. Yet as Judge Kozinski points out in his dissenting opinion (which Judges Rymer and McKeown joined), *Marx* was "a class action that bristled with client 'consultation difficulties.'" Pet. App. 17, Kozinski, J. (dissenting), citing *Marx*, 87 F.3d at 1053-54. In sharp contrast, petitioners' "action is not complicated; the [respondents'] lawyer worked at a large, sophisticated law firm [Boies, Schiller & Flexner LLP]; and the rule is as

clear as legal rules get . . . ." Pet. App. 18, Kozinski, J. (dissenting).

Significantly, the District Court's analysis ignored the *Pioneer* guideline, namely, that "ignorance of the rules or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer,* 507 U.S. at 392. Indeed, the District Court's decision does not refer to the guideline. Pet. App. 23-27. As this Court has recognized in other abuse-of-discretion settings, "a district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

Assuming arguendo that the District Court consciously decided that the *Pioneer* factors were "unusual" enough to allow the District Court to depart from the *Pioneer* guideline, the District Court abused its discretion under Rule 4. First, the number of days to file a notice of appeal in a civil case is not "unusual."

Second, rules are "usually" clear and "[t]here are surely complicated rules in the law, but [Rule 4] isn't one of them. [Even the judges composing the] majority [of the Ninth Circuit en banc panel below] agree: '[A]ny lawyer . . . should have been able to read the rule correctly.'" Pet. App. 18, Kozinski, J. (dissenting), quoting Pet. App. 3.

Third, even the respondents concede (Brief in Opp. 18) "[t]here is unlikely ever to be harm in the Rule 4(a)(5) setting, because the neglectful appellant has only 30 days after the expiration of his time for appealing in which to request relief." *Prizevoits,* 76 F.3d at 134. Thus, the Second, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits

hold that the usual lack-of-harm does not provide a permissible basis for a district court to depart from the *Pioneer* guideline in Rule 4 cases.[2] Their holding makes good sense and good policy because, otherwise, "the word 'excusable' would be read out of the rule if inexcusable neglect were transmuted into excusable neglect by a mere absence of harm." *Prizevoits,* 76 F.3d at 134. *Silivanch,* 333 F.3d at 366; *Lowry,* 211 F.3d at 463.

Finally, if "the delegation of repetitive legal tasks to paralegals has become a necessary fixture" (Pet. App. 5), then the respondents' experienced federal practitioner's usual delegation to his calendar clerk is not "unusual" (ER 071-073) and, therefore, does not provide a permissible basis for the District Court to depart from the *Pioneer* guideline, even if the calendar clerk had never before made a mistake. *Cf. Hooper,* 43 F.3d at 29; *see also FHC Equities*, 188 F.3d at 686 (citing and quoting with approval *Peake*, 101 F.R.D. at 545-46).

Common sense suggests that this Court considered delegation when it formulated the *Pioneer* guideline. Indeed, "[w]hile delegation may be a necessity in modern law practice, it can't be a lever for ratcheting down the standard for professional competence" (Pet. App. 19, Kozinski, J. (dissenting)) and for ratcheting down the standard of excusable neglect under Rule 4. The Advisory Committee on Appellate Rules plainly contemplated "that the standard of excusable neglect remain a strict one. . . . [I]t is not meant to cover the usual excuse that the lawyer

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[2] *Torres*, 372 F.3d at 1163; *Silivanch*, 333 F.3d at 369-70; *Lowry*, 211 F.3d at 464; *Midwest Employers Cas.*, 161 F.3d at 879-80; *Advanced Estimating System*, 130 F.3d at 998; *Prizevoits*, 76 F.3d at 134.

is too busy, which can be used, perhaps truthfully, in almost every case." Stern, *Changes in the Federal Appellate Rules*, 41 F.R.D. 297, 299 (1967).

Respondents are implicitly arguing that the District Court's extension is proper because it avoided penalizing the respondents for their experienced federal practitioner's omissions regarding a clear, well-known, readily accessible, mandatory, and jurisdictional rule. Brief in Opp. 1-21. This Court has made clear, however, that federal courts must hold clients accountable for the omissions of their federal practitioners. *Link v. Wabash*, 370 U.S. 626, 633 (1962); *accord Pioneer*, 507 U.S. at 396-97. Respondents' argument, therefore, does not provide an appropriate basis for the District Court to depart from the *Pioneer* guideline.

CONCLUSION

The Court should grant the Petition for a writ of certiorari.

Respectfully submitted,

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